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The Litigation Privilege as a Shelter for Miscreant Legal Counsel

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MOTHER DIED, CAN I GET AN EXTENSION?

John Nonnenmacher owes his mother an apology. Apparently unprepared for opening arguments before a federal judge, the Brooklyn lawyer told the presiding judge, in an effort to buy himself a little more time, that his mother had just passed on to the next plane.[1] Fortunately (unfortunately for Mr. Nonnenmacher?), his mother was discovered very much alive upon Mr. Nonnenmacher's co-counsel's hiring of a PI to investigate his partner's dubious claim.[2] Clearly unfazed by his mother's tears and not one to break old habits, Mr. Nonnenmacher doubled down before his sanctions hearing and fibbed to the same judge, claiming he would be unable to attend due to his hospitalization for undisclosed reasons.[3] Wise to Mr. Nonnenmacher's

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[1] Phillip Messing, Kenneth Garger & Laura Italiano, *Lawyer Who Lied About Mom's Death Still Can't Tell the Truth*, N.Y. POST (Apr. 16, 2016, 2:03 AM), http://nypost.com/2016/04/16/lawyer-who-lied-about-moms-death-still-cant-tell-the-truth/.

[2] Martha Neil, *Lawyer Caught Lying About his Mother's Death to Delay Trial*, ABA J. (Apr. 4, 2016, 1:45 PM), http://www.abajournal.com/news/article/report_of_lawyers_moms_death_greatly_exaggerated_federal_judge_who_okd_tria/.

[3] Messing, Garger & Italiano, *supra* note 1. Unfortunately, the stories don't end here. In 2012, Oklahoma attorney John Milton Merritt plead guilty to defrauding his clients (four orphan children) out of hundreds of thousands of dollars (Paradise Lost indeed?). *See* Nolan Clay, *Former Oklahoma City Attorney Dies before Being Sentenced for Stealing from Orphans*, OKLAHOMAN (Sept. 17, 2014, 12:00 AM), https://newsok.com/article/5342744/former-oklahoma-city-attorney-dies-before-being-sentenced-for-stealing-from-orphans?. In 2013, Joseph Caramadre was sentenced to six years in prison for defrauding his clients. Mr. Caramadre was an estate planner who specialized in offering $2000 to terminally ill clients, in exchange for their personal information and signatures. *See* Jess Bidgood, *Prison for Rhode Island Lawyer in Tale of Insurance and Death*, N.Y. TIMES (Dec. 16, 2013), http://www.nytimes.com/2013/12/17/us/prison-for-rhode-island-lawyer-in-tale-of-insurance-and-death.html. Mr. Caramadre used these terminally ill clients' information and signatures to set up annuities in their names that would pay out upon their death to Mr. Caramadre and his fellow investors. *Id.* A more-widely publicized instance is the fall of North Carolina prosecutor Mike Nifong. *See* Tom Jackman, *Disbarred Duke Lacrosse Prosecutor Mike Nifong is Back, Along with More Misconduct Allegations*, WASH. POST (Aug. 30, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/08/30/disbarred-duke-lacrosse-prosecutor-mike-nifong-is-back-along-with-more-misconduct-allegations/?utm_term=

ways, the judge phoned the hospital where he claimed to be recuperating and unsurprisingly discovered that no person named Nonnenmacher currently resided in the facility.[4]

According to a 2013 Pew Research Center poll, lawyer is the most disliked profession in America.[5] Only eighteen percent of Americans believe that lawyers contribute "a lot" to society, while more than a third believe that lawyers contribute "not very much or nothing at all to society."[6] Coming in slightly ahead of lawyers in the popularity contest are journalists, members of the clergy, and business executives.[7] A 2017 Gallup Poll outlining Americans' assessment of honesty and ethical standards in professions ranked lawyers sixteen out of twenty-two of the professions polled.[8] Similar to the 2013 poll, only eighteen percent of Americans rated the honesty and ethical standards of attorneys as "very high or high," while eighty-one percent of those polled said they were "average, low, or very low."[9]

Public disdain for lawyers is a time-honored tradition.[10] Whether a consequence of not understanding the role of legal counsel, high legal

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.91c92f4fc638. Mr. Nifong was the district attorney for Durham County during the Duke lacrosse scandal. *Id.* Later disbarred, Nifong was found to have withheld exculpatory evidence from the accused. *Id.* Nifong's conduct was so egregious that every conviction he obtained while in office was carefully reviewed, revealing other instances of prosecutorial misconduct. *Id.*

4 Messing, Garger & Italiano, *supra* note 1.

5 *Public Esteem for Military Still High*, PEW RES. CTR. (July 11, 2013), http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/.

6 *Id.*

7 *Id.* All of whom are routinely subject to major scandals. *See generally* James Hurley, *Exposing RBS Scandal 'Like Victory at Le Mans,'* TIMES (Feb. 19, 2018, 12:01 AM), https://www.thetimes.co.uk/article/exposing-rbs-scandal-like-victory-at-le-mans-f639rv0zb; Bart Jones, *Queens Man who Claimed Clergy Sex Abuse Gets $500,000 Award*, NEWSDAY (Feb. 13, 2018, 8:44 PM), https://www.newsday.com/long-island/nassau/clergy-abuse-settlement-1.16746543; T. Rees Shapiro, *Jury Finds Reporter, Rolling Stone Responsible for Defaming U-Va. Dean with Gang Rape Story*, WASH. POST (Nov. 4, 2016), https://www.washingtonpost.com/local/education/jury-finds-reporter-rolling-stone-responsible-for-defaming-u-va-dean-with-gang-rape-story/2016/11/04/aaf407fa-a1e8-11e6-a44d-cc2898cfab06_story.html?utm_term=.ec220331c6ce; Roger Yu & Melanie Eversley, *NBC: Brian Williams Suspended for Six Months*, USA TODAY (Feb. 10, 2015, 8:08 PM), https://www.usatoday.com/story/money/2015/02/10/brian-williams-nbc-suspended/ 23200821/.

8 Megan Brenan, *Nurses Keep Healthy Lead as Honest, Ethical Profession*, GALLUP (Dec. 26, 2017), http://news.gallup.com/poll/224639/nurses-keep-healthy-lead-honest-ethical-profession.aspx?g_source=CATEGORY_SOCIAL_POLICY_ISSUES&g_medium=topic&g_campaign= tiles.

9 *Id.* The highest rated professions included nurse, military officer, teacher, and doctor.

10 Consider the oft-quoted, widely-debated line from Shakespeare's Henry the VI, where Dick the Butcher famously mused, "The first thing we do, let's kill all the lawyers." *See* WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2. The

fees, unscrupulous practices, or the perception that lawyers are "hired guns,"[11] the less-than-stellar reputation of lawyers overshadows the important function they play in maintaining the rule of law in democratic societies.[12] Enhancing public faith in the legal profession must successfully address personal attorney conduct. This Article focuses on the overzealous embracement by courts of a doctrine that provides broad protection to shield attorney misconduct—the Litigation Privilege (or the "Privilege").

Part I of this Article provides a succinct view of the Litigation Privilege and its role in the American legal system. Part II sets out a framework for identifying what constitutes "litigation," an essential task for examining what sort of legal procedures and conduct qualify when seeking to invoke the Privilege. Litigation is far more than the time parties spend in a courtroom; yet, in need of examination is what aspects of prospective and actual litigation are sufficiently integral to the judicial process to merit special treatment. Litigation also has obscure temporal boundaries with an amorphous beginning and end. These issues are analyzed at length in this Article. Part III details the current national status of the Litigation Privilege, including relevant court decisions, ethics rules, restatement provisions, and commentary, setting out the minority and majority views on the breadth of the Privilege. Part IV examines a number of recent court opinions that have

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public often interprets the line as a lawyer joke parodying the widespread disdain of lawyers. Idealistic defenders of the legal profession argue that the line in context is in fact referring to the importance of lawyers in society as guardians of the rule of law and is in fact a compliment. Regardless of the actual meaning of the line, that the public takes it as a tongue-in-cheek expression of ridding the world of lawyers is revealing. *See 'Kill the Lawyers,' A Line Misinterpreted*, N.Y. TIMES (June 17, 1990), https://www.nytimes.com/1990/06/17/nyregion/l-kill-the-lawyers-a-line-misinterpreted-599990.html; Nate Orr, *The First Thing We Do, Let's Kill All the Lawyers*, INGRAM'S MAG. (Mar. 22, 2016), https://ingrams.com/article/the-first-thing-we-do-lets-kill-all-the-lawyers/; Robert W. Wood, *First, Let's Kill All the Tax Lawyers*, FORBES (Mar. 5, 2015, 9:44 AM), https://www.forbes.com/sites/robertwood/2015 /03/05/first-lets-kill-all-the-tax-lawyers/.

[11] *See* CHICAGO (Miramax Films 2003), for Richard Gere's character in the Oscar-winning adaptation of the Broadway musical, Chicago: "Do you have five thousand dollars?" *See also* Michael I. Krauss, *The Lawyers as Limo: A Brief History of the Hired Gun*, 8 UNIV. CHI. L. SCH. ROUNDTABLE 325 (2001).

[12] Adam J. White, *Tocqueville's 'Most Powerful Barrier': Lawyers in Civic Society*, AM. ENTERPRISE INST. (Sept. 11, 2013), http://www.aei.org/publication/tocquevilles-most-powerful-barrier-lawyers-in-civic-society/ (discussing Alexis de Tocqueville's reflection on lawyers in his magnum opus "Democracy in America" and citing de Tocqueville's assessment of lawyers as the "best brake against the 'revolutionary spirit and unreflective passions of democracy.'"); *see* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey Mansfield & Delba Winthrop eds., trans., Univ. Chic. Press 2000) (1835, 1840); *see generally* Lord Hacking, Preface, *The Rule of Law Papers*, 43 INT'L LAW. 3 (2009).

pushed the boundaries of the Privilege, embracing unduly expansive views of the scope of litigation and providing refuge for attorneys' fraudulent conduct under the Privilege. Part V analyzes ramifications of these expansions of the Privilege, focusing on the dangers of such undue expansion, and offers a suggested framework for the Privilege's proper invocation.

I
THE LITIGATION PRIVILEGE: A SUCCINCT VIEW

The concept of the Litigation Privilege finds its roots in English law[13] and has endured through American jurisprudence to the present day.[14] Designed to help ensure that attorneys perform their role as advocates during the course of litigation, the Privilege is deemed essential for enabling lawyers to zealously represent their clients without the threat of suit from disgruntled non-clients.[15] The existence of the Privilege is nearly universal in U.S. common law jurisdictions and has been embraced by the American Law Institute (ALI) in its Restatements.[16]

Although courts vary somewhat in their description of the Privilege, the essence of the Privilege is that "attorneys are immune from civil liability to non-clients 'for actions taken in connection with

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[13] T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 916 (2004) (discussing the origin of the Privilege, pointing to the Norman Conquest and the introduction of the adversarial system). The first recorded case where the Privilege granted an attorney immunity was in 1606. *See* Brook v. Montague (1606) 79 Eng. Rep. 77 (Eng. & Wales).

[14] Anenson, *supra* note 13, at 916.

[15] *Id. See, e.g.*, Hart v. Larson, 232 F. Supp. 3d 1128, 1137 (S.D. Cal. 2017) (citing Jacob B. v. Shasta, 154 P.3d 1003, 1007–08 (Cal. 2007) (internal quotations omitted)); Silberg v. Anderson, 786 P.2d 365, 370 (Cal. 1990); Loigman v. Twp. Comm. of Middletown, 889 A.2d 426, 435 (N.J. 2006); Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015).

[16] *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57 (AM. LAW INST. 2000); RESTATEMENT (SECOND) OF TORTS § 586 (AM. LAW INST. 1977). With respect to the Litigation Privilege, the Second Restatement of Torts sets forth an absolute privilege for attorneys in a defamation action. In this regard, section 586 provides that "[a]n attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or . . . a judicial proceeding in which he participates as a counsel, if it has some relation to the proceeding." *Id.*

The Third Restatement of the Law Governing Lawyers provides for, among other things, an absolute privilege for attorneys when "publish[ing] matter concerning a non-client if: (a) the publication occurs in communications preliminary to a reasonably anticipated proceeding . . . [where the] lawyer participates as counsel . . . and (c) the matter is published to a person who may be involved in the proceeding, and the publication has some relation to the proceeding." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57.

representing a client in litigation.'"[17] Traditionally, the attorney's actions must be "in litigation" in order to receive the immunity the Privilege affords.[18] A number of recent decisions have embraced an expansive approach with respect to the parameters of litigation. For example, the Texas Supreme Court extended the Privilege to include immunity from suit for alleged fraudulent activity on the part of an attorney and his law firm in the course of representing a client in the aftermath of a divorce action.[19] As another example, the U.S. Court of Appeals for the Fifth Circuit applied the Privilege in the context of alleged attorney fraudulent conduct during a government investigation.[20] Indeed, these decisions query whether the scope of the Privilege may extend outside litigation, thereby raising the specter that this doctrine could encompass legal representation in an advisory, transactional, or other non-litigation setting.[21] The extension of the

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17 *Cantey Hanger*, 467 S.W.3d at 481.

18 *See, e.g.*, Tuff-N-Rumble Mgmt., Inc. v. Sugarhill Music Pub., 49 F. Supp. 2d 673, 680 (S.D.N.Y. 1999); *Jacob B.*, 154 P.3d at 1007; Echevarria v. Cole, 950 So. 2d 380, 384 (Fla. 2007); *Loigman*, 889 A.2d at 433. It should be noted for clarity that "immunity" and "privilege" are used so interchangeably in both case law and commentary on this subject so as to effectively mean the same thing. *See generally* Anenson, *supra* note 13, at 917–22. Some debate exists as to whether the Privilege acts as a qualified or absolute immunity from suit. Absolute immunity refers to a true immunity to suit and is not merely an affirmative defense, thereby effectively allowing the holder of the immunity to avoid all forms of liability. *See* Troice v. Proskauer Rose, LLP, 816 F.3d 341, 346–47 (5th Cir. 2016). A qualified immunity does not "categorically" exempt the holder of the immunity from suit, as defendants are still required to respond to discovery in order to determine whether or not the defendant is entitled to exercise the immunity. *Id.* This issue is not addressed herein as it has been discussed thoroughly elsewhere. *See, e.g.*, Seena Forouzan, *The Officer Has No Robes: A Formalist Solution to the Expansion of Quasi-Judicial Immunity*, 66 EMORY L.J. 123 (2016); Mark C. Niles, *A New Balance of Evils: Prosecutorial Misconduct, Iqbal, and the End of Absolute Immunity*, 13 STAN. J. CIV. RTS. & CIV. LIBERTIES 137 (2017); Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409 (2016). For the purposes of this article, if attorney conduct is considered "privileged," it will provide immunity from suit. *See* Taylor v. McNichols, 243 P.3d 642, 657 (Idaho 2010) (stating that the difference between an absolute and qualified privilege is one of framing, not in application).

19 *Cantey Hanger*, 467 S.W.3d at 483.

20 *Troice*, 816 F.3d at 341 (applying Texas law). The decision in *Cantey Hanger* was entered during the pendency of the *Troice* appeal. It may seem surprising that the court in *Troice* deemed the issue of the Litigation Privilege's application outside the context of litigation waived in the district court, as *Cantey Hanger*, which substantially affected the application of the Litigation Privilege, was decided during the pendency of the appeal in *Troice*. An issue should not be deemed waived when the law after the district court's ruling, such as when the matter is pending an appeal, has changed. *See* Harper v. Va. Dept. of Tax'n, 509 U.S. 86, 95–97 (1993); Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203, 211 (2011).

21 *Cantey Hanger*, 467 S.W.3d at 482 n.6. The lawyer as "gatekeeper" has been addressed by one of the authors on numerous occasions. *See, e.g.*, MARC I. STEINBERG,

Privilege to non-litigation contexts would constitute a startling departure from the doctrine's original policy mores, obfuscating the public policy rationales underlying the Privilege. Such an extension of the Privilege would provide undue refuge to miscreant attorneys from aggrieved non-clients.

II
LITIGATION: WHAT EXACTLY DO WE DO HERE?[22]

A. Not All Fun and Jury Verdicts

As the Privilege is traditionally applied to litigation, it is first necessary to ascertain what constitutes "litigation" before determining whether an attorney's actions fall within the traditional articulation of the Privilege. Black's Law Dictionary defines litigation as: "The process of carrying on a lawsuit" or "[a] lawsuit itself."[23] Perceptions of litigation often conjure up images of TV shows and movies, John Grisham novels, the cross-examination of witnesses, and the rendering of jury verdicts. Fictionalized portrayals of both civil and criminal trials have long captivated the American public in every medium of entertainment.[24] These scenes selectively focus on the more exciting parts of litigation: opening statements, dramatic cross-examinations, closing arguments, and verdicts. Yet, we know that *carrying on* a lawsuit is more than the mere days spent at trial (if a suit even goes as far). In fact, the overwhelming majority of lawsuits are dismissed or settled out of court.[25] But certainly the undertaking of pleadings, responses, discovery, negotiations, and other parts of pre-trial

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LAWYERING AND ETHICS FOR THE BUSINESS ATTORNEY (4th ed. 2016); Marc I. Steinberg & James Ames, *From the Regulatory Abyss: The Weakened Gatekeeping Incentives Under the Uniform Securities Act*, 35 YALE L. & POL'Y REV. 1 (2016).

22 A reference to the superb comedy, Office Space, and its exploration of a character's apparent uselessness in his professional capacity.

23 *Litigation*, BLACK'S LAW DICTIONARY (10th ed. 2014) (More expansively, the root verb "litigate" is defined as "[t]o take or defend against a claim or complaint in a court of law."). Note that one of the authors of this article, Marc I. Steinberg, is on the Panel of Academic Contributors for Black's Law Dictionary.

24 For relatively well-known examples, see *Perry Mason*, TO KILL A MOCKINGBIRD, *Law & Order*, *How to Get Away with Murder*, *Suits*, *Goliath*, THE LINCOLN LAWYER, BRIDGE OF SPIES, and RUNAWAY JURY.

25 Patricia Lee Refo, *The Vanishing Trial*, 30 ABA SEC. LITIG. 2 (2004) (examining the startling trend of the decline in cases decided at trial—behind this decline is the rising cost of litigation, the length of the course of a lawsuit (often due to a clogged court docket), and the increasing importance of alternate methods of dispute resolution, including arbitration and mediation).

preparation and procedure are part of litigation, even if the case never proceeds to trial.[26]

Forms of alternative dispute resolution (ADR) such as mediation and arbitration, in addition to certain inquiries such as government investigations and internal corporate investigations, also resemble—albeit to varying degrees—the litigation process.[27] For example, arbitration is a contractual undertaking where adverse parties agree to submit themselves to an arbitration process, where the merits of the dispute are resolved in front of one or more private arbitrators, in lieu of settling their potential differences in court.[28] The U.S. justice system, where deemed appropriate, has facilitated the propriety of arbitration to effectuate the expeditious resolution of controversies, providing a more informal and cost-effective forum while lightening the caseload for the judiciary.[29]

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26 With respect to criminal cases, the United States government reports that more than ninety percent of criminal defendants plead guilty instead of choosing to go to trial. *See Criminal Cases*, U.S. CTS., http://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases (last visited Feb. 10, 2018). With respect to civil litigation, a 2015 justice report revealed that only four percent of state court actions were resolved at trial. *See The Landscape of Civil Litigation in State Courts*, NAT'L CTR. FOR ST. CTS., https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx (last visited Feb. 12, 2018). The federal civil trial rate is even lower, reported as 1.1 percent of filed cases. *See* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1783 (2015) (citing *U.S. District —Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending December 31, 2014 (Table C-4)*, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/sites/default/files/c04dec14_0.pdf (last visited Aug. 8, 2018)).

27 *See generally* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Upjohn Co. v. United States, 449 U.S. 383 (1981); 25A MARC I. STEINBERG & RALPH C. FERRARA, SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT (2d ed. 2001 & Supp. 2017, 2018).

28 *See generally* Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes*, A.B.A., https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf (last visited Feb. 20, 2018). Other benefits of arbitration include the ability to select individual arbitrators, the total confidentiality of the proceeding, relaxed discovery and procedural rules, and the difficulty of appeal, which allows both parties to enjoy a high degree of certainty and finality. *Id. See generally* Norman S. Poser, Foreword, *Securities Arbitration: A Decade After* McMahon, 62 BROOK. L. REV. 1328 (1996). As another example, mediation provides a forum that seeks to solve parties' differences outside the courtroom, offering a flexible and informal approach to negotiating a settlement of the subject litigation. *See generally* Rebecca H. Hiers, *Navigating Mediation's Uncharted Waters*, 57 RUTGERS L. REV. 531 (2005).

29 *See McMahon*, 482 U.S. at 233 ("[T]he mistrust of arbitration that formed the basis for [previous Court opinions] is difficult to square with the assessment of arbitration that has prevailed since that time. This is especially so in light of the intervening changes in the regulatory structure of the securities laws. Even if [negative] assumptions regarding arbitration were valid at the time [Wilko v. Swan, 346 U.S. 427 (1953)] was decided, most certainly they do not hold true today for arbitration procedures subject to the SEC's

With respect to how they should fit within the definition of litigation, corporate internal investigations and government investigations pose similarities to litigation in the traditional sense. Corporate internal investigations enable boards of directors, executive management, and other key constituencies to better understand the wisdom (or lack thereof) of corporate policies or procedures.[30] Additionally, corporate internal investigations are used in ascertaining whether employees of the corporation, acting in such capacity, have engaged in unlawful or otherwise improper conduct.[31] These investigations usually are conducted through document review and employee interviews.[32] By comparison, government investigations normally involve the undertaking of fact-finding inquiries to determine whether specific persons, including companies and individuals, have violated certain laws or regulations that the agency is responsible for enforcing.[33] As addressed later in this Article, in order to determine whether these types of investigations fall within the definition of litigation, attention should focus on the relatively elastic time frames in which litigation takes

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oversight authority."); *see also* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989) ("To the extent that [prior decisions] rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.").

30 *See* STEINBERG, *supra* note 21, at 52.

31 *See, e.g.*, *Upjohn Co.*, 449 U.S. 383 (involving the investigation of potentially improper payments to foreign officials); *In re* Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014) (involving the investigation of kickbacks to government employees during the Iraq War). *See also* Ryan v. Gifford, No. 2213-CC, 2007 WL 4259557, at *1 (Del. Ch. Nov. 30, 2007) (involving a derivative action alleging breach of the duty of loyalty because of stock option backdating); Thomas R. Mulroy, Jr. & W. Joseph Thesing, Jr., *Confidentiality Concerns in Internal Corporate Investigations*, 25 TORT & INS. L.J. 48 (1989).

32 *See* STEINBERG, *supra* note 21, at 52–53. Employee interviews in particular pose difficulties for counsel with respect to communications made to employees. In the course of internal investigations, counsel represents the company as an entity, not individual directors, managers, or employees. Often, these internal investigations can produce conflicts between the interests of the corporation and particular employees. *See id.*; *see also* David Hechler, *'Upjohn' Warning is a Vital Tool*, NAT'L L.J. (Jan. 16, 2006, 12:00 AM), https://www.law.com/nationallawjournal/almID/900005445098/upjohn-warning-is-a-vital-tool/.

33 *See, e.g.*, SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735 (1984); United States v. Powell, 379 U.S. 48 (1964); United States v. Morton Salt Co., 338 U.S. 632 (1950); *Investigations by the Securities and Exchange Commission*, U.S. SEC. AND EXCHANGE COMMISSION, https://www.sec.gov/fast-answers/answersinvestghtm.html (last visited Feb. 10, 2018). The SEC ordinarily conducts its investigations in a confidential manner, with the investigation only becoming public if an enforcement action is commenced. *Id.* For further discussion, *see* Marc I. Steinberg, *SEC and Other Permanent Injunctions–Standards for Their Imposition, Modification, and Dissolution*, 66 CORNELL L. REV. 27 (1980). For further discussion, *see infra* notes 133–51 and accompanying text.

place, as well as the sort of substantive matters that are within the litigation framework.[34]

B. The Beginning of Litigation: Is There a Standard?

While it is true in a technical sense that litigation begins with the formal filing of a complaint by a party with a court, attorneys begin the representation of their clients long before the filing of the complaint.[35] In fact, the Federal Rules of Civil Procedure (FRCP) require as much, mandating that lawyers make a reasonable inquiry into the law and facts of a client's potential claim before filing a lawsuit.[36] As a result, a competent attorney will engage in meaningful dialogue with a client,

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[34] For further discussion, *see infra* notes 133–51 and accompanying text.

[35] *See* MODEL RULES OF PROF'L CONDUCT r. 1.18 (AM. BAR ASS'N 1983) (describing duties of a lawyer to prospective clients). Even before a lawyer officially begins representation, certain duties and responsibilities are already required of an attorney who has a consultation with a client. These duties include the mandate to keep confidential the information learned from a prospective client. *See id.* at r. 1.18(a).

[36] FED. R. CIV. P. 11. Rule 11 was instituted as a way to deter frivolous lawsuits from clogging the courthouse, as well as rendering it more difficult for a party without a meritorious claim to induce the opposing party to enter into a quick settlement. *See* Robert L. Carter, *The History and Purposes of Rule 11*, 54 FORDHAM L. REV. 4, 4 (1985). The effectiveness of Rule 11 has been widely debated. *See* Edward D. Cavanagh, *Mandating Rule 11 Sanctions? Here We Go Again!*, 74 WASH. & LEE L. REV. ONLINE 31, 32 (2017); *see also* Sandra Davidson, *FRCP 11: A Wounded Remedy for Unethical Behavior*, 62 J. MO. B. 16 (2006). Rule 11 is one of the backstops to the "zealous advocacy" standard of legal representation. That similar checks exist, or should exist, with regard to attorney conduct, should be buttressed by reading into the benefits and pitfalls of the numerous revisions of Rule 11. The Private Securities Litigation Reform Act of 1995 (PSLRA) addressed congressional concerns of abusive "strike suits" in the securities class-action context. Due to the exorbitant costs of defending these cases, as well as the possibility of facing an adverse verdict in the hundreds of millions of dollars, corporations and their fiduciaries often settle as a matter of risk management. The PSLRA sought to prevent frivolous class-actions by staying discovery during a pending motion to dismiss, as well as enhancing pleading and notice requirements, in addition to changing the process for the selection of lead plaintiffs. The PSLRA also requires courts to make a mandatory judicial inquiry into whether attorneys complied with FRCP Rule 11, and if a violation is found, sanctions are required. For a treatment of the PSLRA, *see* MARC I. STEINBERG ET AL., SECURITIES LITIGATION: LAW, POLICY, AND PRACTICE § 11.03 (2016). In addition to Rule 11 and federal provisions such as the PSLRA, a number of states have taken action aimed at frivolous lawsuits whose purpose is to deter or intimidate opposing parties, known officially as Strategic Lawsuits Against Public Participation ("SLAPP"). *See State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection/ (last visited Feb. 12, 2018). Twenty-eight states have passed anti-SLAPP statutes aimed at deterring this species of suit, including California, Texas, and New York. *See* CAL. CIV. PRO. CODE § 425.16 (West 2018); TEX. CIV. PRAC. & REM. CODE ANN. § 27.001 *et seq.* (West 2011); N.Y. CIV. RTS. LAW § 70-a (McKinney 2018).

investigate the facts of the case, and research the law before moving forward with the assertion of a claim.[37]

FRCP Rule 11 is, of course, best known to lawyers as the provision of the federal rules that provides for sanctions against parties and their attorneys, including the imposition of monetary penalties.[38] The provisions of Rule 11 are also contained in state law mandates.[39] The fact that penalties might be imposed by a court based on an attorney's conduct (or neglect) before the commencement of an action

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[37] *See* STEINBERG, *supra* note 21, at 51–53; Melissa L. Stuart, *A Young Lawyer's Guide to Rule 11 Sanctions*, A.B.A. (June 20, 2012), https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2012/spring2012-young-lawyers-guide-rule11-sanctions.html.

[38] Rule 11 reads in pertinent part:

> (b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.
>
> (c) Sanctions.
>
> (1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

FED. R. CIV. P. 11 (b)–(c)(1).

Examples of cases where Rule 11 sanctions against attorneys have been imposed include Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018, 1026 (5th Cir. 1994) (holding that sanctions were appropriate when the plaintiff's client had clearly committed insurance fraud (taking out over thirteen insurance policies on his vehicle) and counsel failed to conduct a reasonable inquiry into whether his client's claim was "well-grounded" in fact); Wolfington v. Reconstructive Orthopaedic Assocs. II, P.C., 275 F. Supp. 3d 584, 605 (E.D. Pa. 2017) (holding that sanctions were appropriate when counsel had reason to know the suit in question was merely an attempt at extortion), *appeal docketed*, No. 18-1182 (3d Cir. Jan. 31, 2018); *In re* Anderson, 128 B.R. 850, 857 (D.R.I. 1991) (holding that sanctions were appropriate when counsel's argument was so baseless so as to "evidenc[e] a total lack of concern . . . for the Court's resources").

[39] *See, e.g.*, CAL. CIV. PRO. CODE § 128.7 (West 2018); FLA. STAT. ANN. § 57.105 (West 2018); N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1 (2018); TEX. R. CIV. P. 13.

demonstrates that an attorney's responsibilities to both his client and the system at large are not constrained by the formalities of a lawsuit.[40] Ordinarily, an attorney may take other actions on the client's behalf before commencing a suit, such as when an attorney believes her client has a meritorious claim. For example, a demand letter may be issued or the parties may enter into negotiations prior to the filing of a claim in an attempt to avoid a lawsuit.[41] Although the attorney incurs potential liability exposure prior to the commencement of litigation,[42] as discussed below, a number of legal protections are afforded in order to curtail the potential chilling effect prospective litigation might have on an attorney's representation of her client.[43]

The reality that the litigation process begins prior to the filing of a lawsuit is reflected in the recognition of several legal doctrines that may be invoked before the institution of legal action, thereby covering pre-complaint communications and conduct. The most widely known of these protections is the attorney-client privilege (which applies in advisory, transactional, and litigation settings).[44] The privilege is necessarily broad because it protects, with certain exceptions, a wide variety of communications that implicate the rendering of legal advice

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40 Further, the American Bar Association sets forth a number of obligations for attorneys that permeate the entirety of a representation, without regard to litigation. These include a duty of competence under Rule 1.1, diligence under Rule 1.3, communication under Rule 1.4, confidentiality under Rule 1.6, among others. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1, 1.3, 1.4, 1.6 (AM. BAR ASS'N 1983).

41 Demand letters and other means of pre-litigation "persuasion" are commonly implemented as a way to prompt resolutions in an inexpensive and timely manner. *See* Gerald Lebovits, *By Popular Demand: Demand Letters*, 88 N.Y. ST. B. ASS'N J., Oct. 2016, at 64; Bret Rappaport, *A Shot Across the Bow: How to Write an Effective Demand Letter*, 5 J. ASS'N LEGAL WRITING DIRECTORS 32 (2008). Demand letters have become a subject of controversy, particularly with respect to patent litigation, as "Patent Trolls" often issue these letters in an attempt to intimidate potential opposing parties into paying a settlement in order to avoid litigation. *See* Hayden W. Gregory, *From the Hill—Combatting So-Called Patent Trolls: Demand Letters Demand Attention*, 6 LANDSLIDE 2 (2013); Jason Vogel & Jeremy A. Schachter, *How Ethics Rules Can Be Used to Address Trademark Bullying*, 103 TRADEMARK REP. 503 (2013); Craig Drachtman, Comment, *Taking on Patent Trolls: The Noerr-Pennington Doctrine's Extension to Pre-Lawsuit Demand Letters and Its Sham Litigation Exception*, 42 RUTGERS L. REC. 229 (2015).

42 Rule 1.18 of the Model Rules of Professional Conduct makes clear that an attorney can actually incur liability to *prospective* clients if he or she fails to take proper steps with respect to declining representation, among other things. *See* PROF'L CONDUCT r. 1.18.

43 *See infra* notes 44–51 and accompanying text.

44 "The client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney." *See Attorney-Client Privilege*, BLACK'S LAW DICTIONARY (10th ed. 2014). For an in-depth discussion of the attorney-client privilege, see Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 GEO. J. LEGAL ETHICS 201 (2010).

between attorneys and their clients, from discovery by opposing parties to disclosure to third parties, including the government, unless the client waives protection.[45] Similar to the Litigation Privilege, the attorney-client privilege is designed to ensure candor between attorneys and their clients, and in the criminal context, it deters violations of due process.[46] Additionally, the attorney-client privilege extends to in-house counsel who provide legal advice to all levels of employees, including in the context of internal investigations.[47]

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[45] *See* Eric D. McArthur, *The Search and Seizure of Privileged Attorney-Client Communications*, 72 U. CHI. L. REV. 729, 736 (2005) (citing United States v. Voigt, 89 F.3d 1050, 1066 (3d Cir. 1996) (discussing that although the attorney-client privilege does not itself constitute a constitutional right, its elimination or compromise may result in a violation of the Fifth Amendment)).

The attorney-client privilege is necessarily broad and encompasses a wide variety of communications between attorneys and their clients. The "Wigmore Schema" provides a widely-used formulation of the attorney-client privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the privilege be waived.

24 FED. PRAC. & PROC. EVID. *Introductory Analysis* § 5473, Westlaw (database updated April 2018). However, there exist a number of exceptions to the attorney-client privilege, such as the crime-fraud exception, which can defeat the attorney-client privilege when attorney-client communications have been used to further a crime or fraud. *See generally* United States v. Zolin, 491 U.S. 554, 563 (1989).

[46] The attorney-client privilege is distinguishable from the broader duty of confidentiality. The attorney-client privilege is a rule of evidence which prevents the opposing party from compelling the production of covered communications. The duty of confidentiality pertains to the responsibility of counsel to keep his client's secrets. *See* PROF'L CONDUCT r. 1.6.

[47] Upjohn Co. v. United States, 449 U.S. 383 (1981). *See also In re* Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014) (holding that a defense contractor's internal investigation during a mandatory compliance program is protected by the attorney-client privilege where a primary purpose of the investigation was to obtain legal advice); Exxon Mobil Corp. v. Hill, 751 F.3d 379, 382 (5th Cir. 2014). The court in *Exxon Mobil* held that an in-house lawyer's memorandum concerning a question of disclosure relating to contract negotiations was protected under the attorney-client privilege. *Id.* The court noted a distinction between business and legal advice. *Id.* Although an in-house attorney may have several roles within an organization, so long as the advice constitutes legal advice, it will be privileged. *Id.* These investigations are most often performed to determine whether an enterprise has run afoul of laws or regulations, thereby serving as a form of legal advice to the enterprise. The application of the attorney-client privilege to in-house legal counsel is not a universal concept in other legal systems, with a particularly notable example being the European Union, where no such concept is recognized. *See generally* Eugene Skonicki, *Building a Wall Where a Fence Will Do: A Critique of the European Union's Denial of Attorney-Client Privilege to In-House Counsel*, 21 GEO. J. LEGAL ETHICS 1045 (2008).

Another example of the law's recognition of the need for pre-litigation protection is found in the attorney work-product doctrine. Somewhat similar to the attorney-client privilege, the work-product doctrine protects documents and other tangible or intangible things from discovery by an opposing party, including information of a party that was prepared by an attorney *in anticipation of litigation*.[48] An opposing party may discover attorney work-product only if it has a substantial need for the discovery and cannot obtain substantially equivalent information without undue hardship.[49] Additionally, the "mental impressions, conclusions, opinions or legal theories" of an attorney as to the factual and legal considerations of the case are substantially more difficult to obtain.[50] The attorney work-product doctrine exists to help ensure that lawyers are diligent and effective in preparing for a client's potential lawsuit without having undue concern that their diligence will be undermined by those materials being subject

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[48] FED. R. CIV. P. 26(b)(3); *see* Hickman v. Taylor, 329 U.S. 495 (1947). There are certain similarities between the attorney work-product doctrine and that of the Litigation Privilege. Both seek to protect the diligence and candor with which an attorney seeks to discharge his duties, and both protect certain actions before the declaration of a lawsuit. However, certain key differences should be noted. First, the protections that they provide, although designed to protect similar interests, guard against different threats to those interests. The work-product doctrine rewards and encourages attorneys to gather as much information on their cases as practicable, without having to worry about opposing parties benefitting from such attorney's efforts by simply demanding discovery, either to keep the benefitting party's costs down or to reward laziness. The work-product doctrine also protects the integrity of discovery. Without it, the parties' counsel might engage in a game of "cat and mouse" in an effort to throw off the other party's efforts, by intentionally failing to disclose key evidence to one's opponent. By comparison, the Litigation Privilege protects attorneys from *third parties* as well as the opposing party who would seek to commence an action against the attorney for defamation or a number of other potential causes of action for counsel's alleged misconduct. For example, in order to deflect liability from her client, an attorney might seek to implicate instead a non-party, potentially damaging that party's reputation or financial interests. This tactic is relatively common at trial and helps the attorney to zealously defend her client. *See e.g.*, *Sixth Amendment at Trial*, 44 GEO. L.J. ANN. REV. CRIM. PROC. 729, 741–42 (2015) ("When cross-examining a witness, the defendant must be permitted to test both the witness's credibility and the witness's knowledge of the material facts in the case. If the witness claims a lack of memory while testifying, the defendant must receive a full and fair opportunity to probe and expose the weaknesses in the testimony through cross-examination."). *See generally* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE (6th ed. 2017).

[49] *See* FED. R. CIV. P. 26(b)(3)(A)(ii).

[50] *See generally* United States v. Nobles, 422 U.S. 225, 239–40 (1975) (relating to the production of witness statements for cross-examination at trial); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161 (1975) (holding that government intra-agency memoranda are not protected from public records requests); *Hickman*, 329 U.S. at 508 (recognizing the work product doctrine, which would later be codified in the Federal Rules of Civil Procedure).

to discovery. Whether the extension of the Litigation Privilege in a similar manner is meritorious is addressed further below.[51]

C. Can We Go Home Yet: When Does Litigation End?

As in the discussion addressing the beginning of litigation, using formalities, such as the rendering of a judgment, to define the termination of litigation is unhelpful. A clear example of this point is the ability of parties to appeal judgments.[52] Ultimately, the losing party may decline to appeal or its appellate remedies may be exhausted. Nonetheless, there is still a need to settle the client's affairs post-lawsuit, whether with respect to collecting on a judgment, paying a judgment, or dealing with numerous other pieces of fallout from the end of a lawsuit. Thus, the precise point in time that litigation terminates within the context of client representation is murky. For example, the difficulties establishing the end of an attorney-client relationship is evidenced by the issues raised with respect to the tolling of the statute of limitations in legal malpractice cases.[53] Nonetheless, at some point, there must be an end to a lawsuit and an attorney's representation of the client with respect to that matter. Well-drafted engagement letters assist in enabling attorneys and clients to better understand the bounds of their relationship, whether the representation is on a continuing basis or for a fixed period, and on which types of legal issues the attorney has agreed to advise.[54]

The American Bar Association's (ABA) approach to attorney-client confidentiality further illustrates the expansive boundaries of representation. Rule 1.6 relates to maintaining the confidentiality of

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51 *See infra* notes 140–49 and accompanying text.

52 *See* FED. R. APP. P. 4(a)(1)(A) (allowing for an appealing party to take up to thirty days before filing a notice of appeal with the district court). However, there are exceptions from the thirty-day time period, most notably, for the United States Government.

53 *See e.g.*, Jones v. Rabanco, Ltd., No. C03-3195P, 2006 WL 2237708, at *3 (W.D. Wash. Aug. 3, 2006) (addressing the "end" of the attorney's representation for the purposes of determining the date at which the client's right of action lapses); Aseel v. Jonathan E. Kroll & Assocs., PLLC, 966 N.Y.S.2d 202 (N.Y. App. Div. 2013) (holding the continuous representation doctrine did not toll the statute of limitations).

54 These engagement letters are essential practice for the business attorney advising business enterprises and can serve to alleviate conflicts of interest and confusion amongst the subject persons as to who the lawyer actually represents. For examples of such engagement letters, see STEINBERG, *supra* note 21, at 217–31. *See generally* Marc I. Steinberg & Timothy U. Sharpe, *Attorney Conflicts of Interest: The Need for a Coherent Framework*, 66 NOTRE DAME L. REV. 1 (1990).

client information,[55] and read in conjunction with Rule 1.9,[56] requires that attorneys preserve their client's confidences and secrets with respect to *all* information related to the representation, even after the termination of the representation and the death of the client. This principle thus focuses primarily on maintaining client secrets.[57] It is not directed toward incentivizing counsel to engage in zealous representation through the course of a lawsuit without fear of legal reprisal.[58]

A sensible answer to the question of when litigation should be deemed at an "end" would be the point at which (1) all appeals or opportunities to appeal have been decided or exhausted (final judgment), and (2) the obligations ordered as a result of the resolution of the dispute have been principally determined. In this regard, representative conduct undertaken with respect to a client's compliance with the directives of the court may be deemed a part of that litigation. For example, in the case of a divorce and child custody dispute resolved against a client, the lawyer in the reasonable aftermath of the court's decree may render advice to the client regarding the extent of such client's custody rights. By contrast, assisting a client in the sale of

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[55] *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 1983). Rule 1.6 sets out the broad duty of confidentiality, in addition to a number of specific voluntary exceptions to the rule, particularly related to impending substantial bodily or monetary harm. *Id.*

[56] *See id.* at r. 1.9 (pertaining to duties of counsel to former clients with regard to keeping client confidences and avoiding particular conflicts of interest). As stated by one of the authors,

> It should be recognized . . . that the duty of loyalty and the preservation of the attorney-client relationship are also implicated in successive representation. Attorneys "profess and owe undivided loyalty to their clients." To use confidences against a former client in a later matter would violate the duty of loyalty and make future clients reluctant to disclose confidences. The foundation of the attorney-client relationship would thus be undermined.

MARC I. STEINBERG, CORPORATE AND SECURITIES MALPRACTICE 196 (1992) (quoting Duncan v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 646 F.2d 1020, 1027 (5th Cir. 1981)).

[57] *See generally* PROF'L CONDUCT r. 1.6 cmt. 1–2; *Proving Breach of Former-Client Confidentiality*, 131 HARV. L. REV. 582 (2017); Kathleen Smalley, Rocky Collins & Jonathan Koh, *Confidentiality, Privilege, and Work Product: Special Problems of the In-House Lawyer*, 35 CORP. COUNS. REV. 207, 208 (2016).

[58] *See* sources cited *supra* note 57. The rule contributes to the trust that is the hallmark of the client-lawyer relationship, but it is not absolute. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 59, 60, 71 (AM. LAW INST. 2000). *But see id.* §§ 64, 65. *See generally* Jennifer M. Pacella, *Advocate or Adversary? When Attorneys Act as Whistleblowers*, 28 GEO. J. LEGAL ETHICS 1027 (2015); Misha Yang, *Confidentiality in the United States and China: An Ethical Conundrum and a Proposed Solution*, 29 GEO. J. LEGAL ETHICS 1443 (2016).

assets not covered by the divorce decree to satisfy certain financial obligations created by the judgment should not be considered related to the litigation, as the assets being sold were not part of the decree. Accordingly, a lawyer's role in the context of litigation with respect to a final judgment should relate to the client's actual compliance in regard thereto—as opposed to what specific personal financial steps (not covered in the decree) the client will take to meet her obligations. That, of course, is not to suggest that counsel may not represent the client in any appropriate matter—but legal advice that has an insufficient nexus to an underlying lawsuit should be considered outside the contours of litigation, signifying that the Litigation Privilege should not attach.[59]

As a result of the relatively vague boundaries often presented in what constitutes litigation, and in keeping with the Privilege's underlying public policy rationales, the types of legal proceedings or settings in which the Privilege affords legal counsel protection has been broadly construed.[60] The Restatement (Second) of Torts requires only that there be "*some* relation to the [underlying litigation]."[61] The American Law Institute sets forth that the conduct is privileged if directed to someone who "may be involved in the proceeding, and the [conduct] has some relation to the proceeding."[62] The Privilege has been recognized in pleadings, throughout discovery, during testimony of expert witnesses, in both formal and informal pre- and post-trial proceedings, as well as

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[59] *See generally* Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 492 (Tex. 2015) (Green, J., dissenting). *Cantey Hanger*'s dissent makes mention of the "scope-of-representation" privilege, which, if adopted, would encompass a broad spectrum of conduct undertaken by an attorney while representing her client. *See id.* at 493.

[60] *See* Anenson, *supra* note 13, at 940. The article includes a number of different contexts in which the Privilege applies. Conduct during depositions (including during breaks in depositions) is protected as well as statements made during private meetings, in the judge's chamber, and during the investigation of a claim. Types of correspondence protected include demand letters, settlement letters, as well as letters threatening a lawsuit. *Id.* (citing Marshall v. Am. Fed'n of Gov't Emps, 996 F. Supp. 1319 (W.D. Okla. 1997); Rader v. Thrasher, 99 Cal. Rptr. 670 (Cal. Ct. App. 1972); Doe v. Nutter, McClennan & Fish, 668 N.E.2d 1329 (Mass. App. Ct. 1996); Gibson v. Mut. Life Ins. Co., 465 S.E.2d 56 (N.C. Ct. App. 1996); Rolla v. Westmoreland Health Sys., 651 A.2d 160 (Pa. Super. Ct. 1994)).

[61] RESTATEMENT (SECOND) OF TORTS § 587 (AM. LAW INST. 1977) (emphasis added). This provision is part of a larger section dedicated to the tort of defamation and its defenses. As discussed elsewhere in the Article, defamation is the quintessential example of when the Litigation Privilege applies. *See infra* note 67.

[62] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57. One of the authors of this Article, Marc I. Steinberg, served on the Members Consultative Group for this Restatement.

in various types of correspondence.[63] Notably, courts have extended the Privilege to quasi-judicial proceedings,[64] such as arbitrations, mediations, and hearings before government panels.[65] Where murky boundaries mark the beginning and end of litigation, a flexible application of the Litigation Privilege should be implemented.

III
THE PRIVILEGE AS IT STANDS TODAY—NATIONALLY

A. A Widespread Legal Doctrine

Of the forty-eight states that recognize the Litigation Privilege, forty-two have done so through their court systems, while the remaining six states codified the Privilege by statute.[66] While the quintessential context in which the Privilege is historically asserted is a defamation claim,[67] courts have extended the Privilege to a plethora of other private causes of action, reasoning that "the salutary purpose

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[63] *See* Anenson, *supra* note 13, at 931–32. The privilege has even been extended to church meetings and hospital grievance hearings. *See id.* (citing Thorn v. Blanchard, 5 Johns. 508, 530 (N.Y. 1809); McMillan v. Birch, 1 Binn. 178 (Pa. 1806)).

[64] *See, e.g.*, Simms v. Seaman, 69 A.3d 880, 888 (Conn. 2013); Taylor v. McNichols, 243 P.3d 642, 653 (Idaho 2010); Rabinowitz v. Wahrenberger, 966 A.2d 1091, 1096 (N.J. Super. Ct. App. Div. 2009).

[65] *See, e.g.*, Piper M. Willhite, *Defamation Law: Privileges from Liability: Distinguishing Quasi-Judicial Proceedings from Proceedings Which Are Preliminary to Judicial Hearings*, 47 OKLA. L. REV. 541 (1994). *See also* Rainier's Dairies v. Raritan Valley Farms, Inc., 117 A.2d 889 (N.J. 1955) (involving the loss of a commercial milk license due to arbitral proceedings held before the "*Director of Milk*") (emphasis added).

[66] *See* Anenson, *supra* note 13, at 917. For states that codify the Privilege by statute, *see* CAL. CIV. CODE § 47(b) (West 1993); MONT. CODE ANN. § 27-1-804(2) (West 1991); N.D. CENT. CODE § 14-02-05(2) (West 1991); OKLA. STAT. ANN. tit. 12, § 1443.1; tit. 21, § 772 (West 1983); S.D. CODIFIED LAWS § 20-11-5(2) (1987); UTAH CODE ANN. § 45-2-3(2) (West 1988). The two remaining states, Georgia and Louisiana, offer less protection for attorneys during litigation. That Louisiana differs from the rest of the United States is not surprising due to the French origins of its legal system (as opposed to the English and Spanish influences that permeate the rest of the country). Georgia's unorthodox approach is more surprising. Georgia requires that comments of counsel be "fairly made" in order to be privileged. *See* GA. CODE ANN. § 51-5-7 (West 2016). *See generally* Alain A. Levasseur & Roger K. Ward, *300 Years and Counting: The French Influence on the Louisiana Legal System*, 46 LA. B.J. 300 (1998).

[67] *See, e.g.*, Johansen v. Presley, 977 F. Supp. 2d 871 (W.D. Tenn. 2013) (involving the attorneys for the holders of Elvis Presley's assets); Officemax Inc. v. Cinotti, 966 F. Supp. 2d 74 (E.D.N.Y. 2013) (addressing the application of the Privilege to an attorney letter alleged to be defamatory); Marchioni v. Bd. of Educ. of Chi., 341 F. Supp. 2d 1036 (N.D. Ill. 2004) (addressing the application of the Privilege to an alleged defamatory letter written during the pendency of the lawsuit); *In re* Quality Botanical Ingredients, Inc., 249 B.R. 619 (Bankr. D.N.J. 2000) (holding the Privilege barred an action for tortious interference in addition to defamation).

of the [P]rivilege should not be frustrated by putting a new label on the complaint."[68] As a result, courts have extended the Privilege to encompass a myriad of causes of action including negligence claims, abuse of process, emotional distress claims, conspiracy, business torts, fraud, and malicious prosecution.[69] For example, in *LatAm Investment, LLC v. Holland & Knight, LLP*,[70] the court held that a law firm and its attorneys were immune from suit when the complainant instituted an abuse of process action against them for allegedly engaging in improper conduct when seeking to collect on a partial judgment on their client's behalf.[71] In its holding, the court reasoned, "Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct."[72] Enabling such improper conduct may very well contribute to the poor reputation of the legal profession.[73] Nonetheless, protections, such as the Privilege, facilitate the objective of zealous representation that forms an integral component of the adversarial litigation framework.

1. What Conduct Is Protected?

One of the primary reasons for the existence of the Litigation Privilege is that, during a lawsuit, attorneys advocate adverse positions

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68 Thornton v. Rhoden, 53 Cal. Rptr. 706, 719 (Dist. Ct. App. 1966).

69 *See, e.g.*, Lerette v. Dean Witter Org., 131 Cal. Rptr. 592 (Ct. App. 1976); Bledsoe v. Watson, 106 Cal. Rptr. 197 (Ct. App. 1973); Pettitt v. Levy, 104 Cal. Rptr. 650 (Ct. App. 1972); Bennett v. Attorney Gen. of Mich., 237 N.W.2d 250 (Mich. Ct. App. 1976); Laub v. Pesikoff, 979 S.W.2d 686 (Tex. App. 1998); Anenson, *supra* note 13, at 927–28.

70 LatAm Inv., LLC v. Holland & Knight, LLP, 88 So. 3d 240, 245 (Fla. Dist. Ct. App. 2011).

71 *Id.* Compare the holding in this case with the Fair Debt Collection Practices Act (FDCPA). Restrictions are placed on law firms and others acting on behalf of creditors in collecting on past due financial obligations. *See* Fair Debt Collection Practices Act, 15 U.S.C. § 1692a (2018) *et seq.*; McDermott v. Marcus, Errico, Emmer & Brooks, P.C., 911 F. Supp. 2d 1, 92 (D. Mass. 2012), *amended in part by* 969 F. Supp. 2d 74 (D. Mass. 2013), *aff'd in part, rev'd in part, and remanded*, 775 F.3d 109 (1st Cir. 2014) (holding that Massachusetts' Litigation Privilege did not shield the attorney from liability under the FDCPA).

72 88 So. 3d at 245; *see* RESTATEMENT (SECOND) OF TORTS §§ 586–88 (AM. LAW INST. 1977). Judges and other officers performing judicial functions retain a form of the Litigation Privilege. Examples include, immunizing them from erroneous decisions, as well as from the infliction of emotional distress or reputational damage to parties before the court. *See* RESTATEMENT (SECOND) OF TORTS § 585; Echevarria v. Cole, 950 So. 2d 380, 384 (Fla. 2007) (quoting Levin v. U.S. Fire Ins. Co., 639 So. 2d 606, 608 (Fla.1994)).

73 *See* Brenan, *supra* note 8 (discussing the American public's view of numerous professions' integrity, highlighting attorneys).

from those advanced by their clients' opponents and by certain other parties and witnesses. During the course of representation, legal counsel may ask embarrassing questions, call into question a person's character, or make other statements that may be emotionally or financially damaging to another party or a non-litigant. For example, in *Rabinowitz v. Wahrenberger*,[74] the court addressed a claim for intentional infliction of emotional distress in connection with deposition testimony of the plaintiff in a previous litigation where the attorney for the adverse party suggested the plaintiff deponent had committed negligent homicide of her own child. The court ruled in favor of the attorney, reasoning that although the pain from the loss of a child is unthinkable, the plaintiff may not go unquestioned merely because he is "distraught" or "enraged."[75]

Rabinowitz offers the opportunity to examine what *type* of communications and conduct are covered under the Litigation Privilege. Although the attorney's questions during the deposition in *Rabinowitz* may be viewed as cruel, even outrageous, most courts hold that an attorney's conduct or communication in the litigation context need not be in good faith to be protected by the Privilege.[76] Recognizing that the Privilege "applies without regard to motives, morals, ethics or intent,"[77] courts rather focus on the relatedness of the conduct or statements to the litigation.

While the Privilege is broad, there are forms of conduct it will not protect. For example, the Privilege will not shield an attorney from

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[74] *See* Rabinowitz v. Wahrenberger, 966 A.2d 1091 (N.J. Super. Ct. App. Div. 2009). This case centered on an attorney's conduct in defending a doctor against a suit for alleged malpractice resulting in the death of a young child. The defendant doctor had refused to admit the child to the hospital after examination, and the child died a short time later. In an attempt to divert blame for the death away from the doctor, the attorney insinuated that the mother of the deceased child physically abused the child and caused its death. *Id. See* Peterson v. Ballard, 679 A.2d 657 (N.J. Super. Ct. App. Div. 1996) (involving a suit for intentional infliction of emotional distress related to an attorney's interview of the plaintiff in a sexual harassment investigation).

[75] *Rabinowitz*, 966 A.2d at 1097. The court went so far as to say the attorney would have been derelict in her duty to not further press the question. *Id.*

[76] *See, e.g.*, Silberg v. Anderson, 786 P.2d 365, 374 (Cal. 1990); Feldman v. 1100 Park Lane Assocs., 74 Cal. Rptr. 3d 1, 19–20 (Ct. App. 2008); Fin. Corp. of Am. v. Wilburn, 234 Cal. Rptr. 653, 655–56 (Ct. App. 1987); Kurczaba v. Pollock, 742 N.E.2d 425, 438 (Ill. App. Ct. 2000); Maulsby v. Reifsnider, 14 A. 505, 507 (Md. 1888); Wiener v. Weintraub, 239 N.E.2d 540, 540–41 (N.Y. 1968); Reagan v. Guardian Life Ins. Co., 166 S.W.2d 909, 912 (Tex. 1942).

[77] *See, e.g.*, *Feldman*, 74 Cal. Rptr. at 19–20 (citing *Silberg*, 786 P.2d at 374) (internal quotation omitted).

liability for conversion and trespass to chattel on behalf of her client.[78] In addition, courts have held that the Privilege does not extend to "litigating in the press," as statements must possess a "connection or logical relation" to a legal proceeding.[79] Further, an attorney is not immune from prosecution for a crime simply because he acted in his professional role.[80] Moreover, with certain exceptions,[81] the statements or conduct protected must have a sufficient nexus to the subject matter of the subject litigation.[82] This requirement is often referred to as an assessment of "relevance."[83] For example, an attorney may not defame the character of a person who is totally unrelated to the lawsuit and then claim that the statements were protected because he happened to be cross-examining a witness at trial.[84] In undertaking a

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78 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 cmt. e (AM. LAW INST. 2000).

79 Rodriguez v. Panayiotou, 314 F.3d 979, 988 (9th Cir. 2002). *See also* Aguirre v. Best Care Agency, Inc., 961 F. Supp. 2d 427, 459 (E.D.N.Y. 2013); Rothman v. Jackson, 57 Cal. Rptr. 2d 284, 294–95 (Ct. App. 1996); Williams v. Kenney, 877 A.2d 277, 291 (N.J. Super. Ct. App. Div. 2005). In *Rodriguez*, for example, the court held that famed singer George Michael's defamatory statements of a police officer during magazine and television interviews regarding his allegedly violative arrest were not protected by the Privilege. 314 F.3d at 989.

80 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 (discussing that attorneys, as a general rule, face liability in the same circumstances as non-lawyers). *See, e.g.*, Skierkewiecz v. Gonzalez, 711 F. Supp. 931 (N.D. Ill. 1989); Avianca, Inc. v. Corriea, 705 F. Supp. 666 (D.D.C. 1989).

81 *See* discussion *infra* notes 118–31 and accompanying text.

82 RESTATEMENT (SECOND) OF TORTS § 586 cmt. c (AM. LAW INST. 1977) ("Therefore it is available only when the defamatory matter has some reference to the subject matter of the proposed or pending litigation, although it need not be strictly relevant to any issue involved in it. Thus the fact that the defamatory publication is an unwarranted inference from the evidence is not enough to deprive the attorney of his privilege. So too, the publication of defamatory matter in a question to a witness may be within the privilege although the question is withdrawn or the witness is directed by the judge not to answer it. On the other hand, the privilege does not cover the attorney's publication of defamatory matter that has no connection whatever with the litigation.").

83 *See* Douglas R. Richmond, *The Lawyer's Litigation Privilege*, 31 AM. J. TRIAL ADVOC. 281, 317 (2007) (pointing to an unorthodox case in which a lawyer implied that the opposing party had a sexual infatuation with sheep, for which he was later successfully sued for libel in spite of the Privilege). *See generally* Gilbert v. People, 1 Denio 41 (N.Y. Sup. Ct. 1845).

84 For example, in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 608 (Fla. 1994), the Florida Supreme Court stated,

> In balancing policy considerations, we find that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding.

Id.

relevance analysis, courts may assess (1) the formality of the proceeding, (2) whether the conduct or statements were voluntary or compulsory, (3) whether a statement was oral or written in nature, and (4) the attorney's own subjective belief as to relevance.[85] The foregoing analysis makes clear that conduct ordinarily must be in some form related to underlying proceedings, placing the Privilege precisely where its function is most necessary.

2. The "Fraud Exception" Debate

Whether the Privilege precludes claims of fraud against an attorney is subject to some dispute. For example, in *Simms v. Seaman*,[86] the Supreme Court of Connecticut extended the Privilege to bar claims of fraud against attorneys in connection with litigation. The court, although condemning fraudulent conduct by attorneys, gave four reasons for its decision:

> (1) [extending the Privilege] does not subvert the underlying *purpose* of a judicial proceeding . . . (2) [fraud] is similar in essential respects to defamatory statements, which are protected by the Privilege, (3) [fraud] may be adequately addressed by other available remedies against the attorney, and (4) [fraud] has been protected by the Litigation Privilege in federal courts, including the United States Supreme Court and the Second Circuit Court of Appeals, for exactly the same reasons that defamatory statements are protected.[87]

In this regard, the Second Circuit reasoned in *Barrett v. United States* that an attorney's immunity should "attach[] to [the] function [engaged in], not to the manner in which he performed it."[88] In a more recent decision, a state court adhered to this approach, holding that the Privilege barred claims for fraud so long as the "statements were material, pertinent, and relevant to the judicial proceeding."[89] The Supreme Court of California, likewise, embraces a broad application of the Litigation Privilege, declining to exclude fraud from coverage.[90]

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85 Anenson, *supra* note 13, at 939–40 (citing Stewart v. Hall, 83 Ky. 375 (1885); Simon v. Potts, 225 N.Y.S.2d 690, 702–03 (Sup. Ct. 1962); School Dist. No. II, Laramie Cty. v. Donahue, 97 P.2d 663 (Wyo. 1940)).

86 Sims v. Seaman, 69 A.3d 880 (Conn. 2013).

87 *Id.* at 892. This includes the function of the State Bar as a regulator of attorney conduct, as well as sanctions that may be handed down by courts, such as in the case of FRCP Rule 11 monetary sanctions. *Id.* at 545.

88 Barrett v. United States, 798 F.2d 565, 573 (2d Cir. 1986); *see also* Janklow v. Keller, 241 N.W.2d 364 (S.D. 1976).

89 Halle v. Banner Indus. of N.E., Inc., 453 S.W.3d 179, 189 (Ky. Ct. App. 2014).

90 *See* Silberg v. Anderson, 786 P.2d 365, 374 (Cal. 1990). The court held that a communication need not have been made "in the interest of justice" (the name of the test

Florida extends coverage to all common-law causes of action, including fraud,[91] offering an expansive interpretation of the Litigation Privilege, as well as affording protection from *statutory* causes of action.[92] In *Echevarria*, the subject law firm was sued for its alleged statutory violations in connection with foreclosure proceedings.[93] In a broad construction of the Privilege, the Florida Supreme Court held that the Privilege encompassed common-law, as well as statutory, causes of action.[94] The court reasoned,

> We see no reason why this rationale would be limited by whether the misconduct constitutes a common-law tort or a statutory violation. The litigation privilege applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a statute, or of some other origin. "Absolute immunity must be afforded to any act occurring during the course of a judicial proceeding . . . so long as the act has some relation to the proceeding."[95]

The application of the Privilege to actions derived from statutory authority is subject to criticism. Concerns regarding separation of powers and judicial lawmaking are triggered.[96] When the legislature has spoken clearly, a court should not decline to follow the statutory

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the California courts used when addressing the application of the Litigation Privilege) in order to be protected by the Privilege: "Finally, endorsement of the 'interest of Justice' requirement would be tantamount to the exclusion of *all* tortious publications from the privilege, because tortious conduct is invariably inimical to the 'interest of justice.' Thus, the exception would subsume the rule." *Id.* at 373. *Silberg* has been applied in a number of California cases. *See, e.g.*, Rusheen v. Cohen, 128 P.3d 713, 718–19 (Cal. 2006); Hagberg v. California Federal Bank, 81 P.3d 244, 247 (Cal. 2004); Crowley v. Katleman, 881 P.2d 1083, 1099 (Cal. 1994); Moore v. Conliffe, 871 P.2d 204, 207 (Cal. 1994). *Silberg* made note of a U.S. Supreme Court case which analyzed a somewhat similar issue. In *Briscoe v. LaHue*, the Court held that the Civil Rights Act of 1871 did not allow a convicted individual to sustain a claim against a police officer when that officer committed perjury during trial. Briscoe v. LaHue, 460 U.S. 325, 345–56 (1983).

91 Echevarria v. Cole, 950 So. 2d 380, 384 (Fla. 2007).

92 *Id.* at 380–81.

93 *Id.* at 381. These statutes gave rise to a statutory right of action, and the plaintiffs sued the law firm. *Id.*

94 *Id.* at 384.

95 *Id.* (quoting Levin, Middlebrsooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994)).

96 For concerns related to this subject, see Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001); Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 15–16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979); Marc I. Steinberg, *Implied Private Rights of Action under Federal Law*, 55 NOTRE DAME LAW. 33 (1979); Moshe Z. Marvit, *The Consequences of Judicial Activism on the Supreme Court*, N.Y. TIMES (Feb. 26, 2018), https://www.nytimes.com/2018/02/26/opinion/judicial-activism-supreme-court.html.

directive and substitute its own desired version of the law.[97] Accordingly, if the legislature explicitly fashions liability under a statute, a court should not disregard the invocation of a statutory cause of action. To do so transforms the judiciary into a super-legislature.[98] Indeed, the boundless sense of *Echevarria* has generated widespread confusion in the lower courts in Florida.[99] Faced with this reality, the Florida Supreme Court has somewhat retreated from its expansive articulation of the Privilege, holding that the tort of malicious prosecution was not in fact impliedly barred by *Echavarria*.[100]

With respect to fraud, in its Restatements, the American Law Institute disagrees with this permissive approach. Section 56 of the Law Governing Lawyers takes the position that "[m]isrepresentation is not part of proper legal assistance . . . [observing that] lawyers are civilly liable to clients and non-clients for fraudulent misrepresentation. . . ."[101] Likewise, the Restatement (Second) of Agency agrees: "An agent who fraudulently makes representations . . . or knowingly assists in the commission of tortious fraud . . . by his principal or by others is subject to liability in tort to the injured person although the fraud or duress occurs in a transaction on behalf of the principal."[102]

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97 "It is emphatically the province and duty of the judicial department to say what the law *is*." Marbury v. Madison, 5 U.S. 137, 177 (1803) (emphasis added). *See President Ronald Reagan, Remarks at the Swearing-In Ceremony for Anthony M. Kennedy as an Associate Justice of the Supreme Court of the United States*, AMERICAN PRESIDENCY PROJECT (Feb. 18, 1988), http://www.presidency.ucsb.edu/ws/index.php?pid=35439.

98 *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("[The Judiciary] may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements.").

99 *See, e.g.*, Edwards v. Epstein, 178 So. 3d 942 (Fla. Dist. Ct. App. 2015); Rivernider v. Meyer, 174 So. 3d 602 (Fla. Dist. Ct. App. 2015); Wolfe v. Foreman, 128 So. 3d 67 (Fla. Dist. Ct. App. 2013).

100 *See* Debrincat v. Fischer, 169 So. 3d 1204 (Fla. Dist. Ct. App. 2015) (addressing whether the Florida Supreme Court had intended to preclude suits for abuse of process in deciding *Echevarria*).

101 RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 56 cmt. f (AM. LAW INST. 2000).

102 RESTATEMENT (SECOND) OF AGENCY § 348 (AM. LAW INST. 1958).

The approach embraced by the Restatement has been adopted by several courts.[103] For example, in *McElhanon v. Hing*,[104] a state court rejected the defendant's assertion that his function as an attorney precluded liability for his alleged involvement in a fraudulent conveyance of assets that eventuated in the creditor of his client being defrauded.[105] Likewise, a West Virginia court found that the Privilege does not shield an attorney from liability for fraud,[106] reasoning that its holding was necessary to "provid[e] a deterrent to [the commission of] intentional conduct which is unrelated to legitimate litigation tactics and which harms an opposing party."[107]

As the foregoing decisions reason, extending the Privilege to shield fraudulent conduct by an attorney, even in connection with litigation, is unacceptable because fraud by definition is fundamentally foreign to the duties and conduct of an attorney.[108] Definitions of fraud include "[the] intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right" and "an act of deceiving or misrepresenting."[109] By definition, fraud is antithetical to the responsibilities of an attorney as "an officer of the legal system and

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[103] *See, e.g.*, Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A., 892 P.2d 230, 235 (Colo. 1995); Fraidin v. Weitzman, 611 A.2d 1046, 1080 (Md. Ct. Spec. App. 1992); Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co., 931 S.W.2d 166, 177 (Mo. Ct. App. 1996); Burger v. Brookhaven Med. Arts Bldg., Inc., 516 N.Y.S.2d 705, 708 (App. Div. 1987); Reynolds v. Schrock, 142 P.3d 1062, 1069 (Or. 2006); Strid v. Converse, 331 N.W.2d 350, 356 (Wis. 1983).

[104] McElhanon v. Hing, 728 P.2d 256, 264 (Ariz. Ct. App. 1985), *aff'd in part and vacated in part*, 728 P.2d 273 (1986).

[105] *Id. But see* Taylor v. McNichols, 243 P.3d 642, 657 (Idaho 2010) (holding that in order to impose liability, it must be shown that the attorney was not acting on behalf of the client).

[106] Clark v. Druckman, 624 S.E.2d 864 (W. Va. 2005) (holding that an attorney does not owe a duty of care to his client's adversary, and that although the Privilege was generally applicable to suits by opposing parties, claims for malicious prosecution and fraud are specifically excepted from coverage by the Privilege).

[107] *Id.* at 870.

[108] *See generally* MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 1983). The elements of a common law fraud action, which helps to demonstrate how foreign fraudulent conduct is from the duties of an attorney, are: (1) the defendant makes a representation to the plaintiff; (2) the representation is material; (3) the representation is false; (4) the defendant knows the representation is false or makes the representation recklessly; (5) the representation is made with the intent the plaintiff would act upon it; (6) the plaintiff relies on the representation; and (7) injury. *See, e.g.*, Small v. Frits Companies, Inc., 65 P.3d 1255, 1258 (Cal. 2003); Lazar v. Super. Ct., 909 P.2d 981, 984 (Cal. 1996); Gandy v. Trans World Comp. Tech. Grp., 787 So. 2d 116, 118 (Fla. Ct. App. 2001); Hanson-Suminski v. Rohrman Midwest Motors, Inc., 898 N.E.2d 194, 203 (Ill. App. Ct. 2008); Exxon Corp v. Emerald Oil & Gas Co., 348 S.W.3d 194, 217 (Tex. 2011).

[109] *Fraud*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961).

a public citizen having special responsibility for the quality of justice" set out in the preamble to the Model Rules.[110] The Model Rules juxtapose the responsibilities of counsel as an officer of the legal system and as a zealous advocate seeking to ensure the quality of justice. These responsibilities must inform and temper each other, not give way to conduct that subordinates all other ethical concerns to the vindication of the client.[111]

Fraud is fundamentally different from defamation and the series of other torts protected by the Privilege. Ordinarily, fraud is deemed a more serious action than defamation. This is evidenced by the availability of criminal proceedings for cases involving fraud and the inclusion of a scienter requirement as an element necessary to prove fraud.[112] No such scienter requirement exists for successful defamation claims.[113] Further, unlike defamation or other similar torts, there are possible criminal ramifications associated with fraud, signifying the seriousness with which it is treated in the American legal system.[114]

While it has been posited that recognizing a fraud exception to the Privilege may unduly "chill" zealous advocacy,[115] this rationale lacks merit. By contrast, application of the Privilege with respect to defamation or interference with business prospects makes sense, as counsel must be free to call into question the character and motives of the opposition and rigorously cross-examine adverse witnesses. In regard to fraud, intending to induce a non-client detrimentally to rely on a known falsehood signifies that the subject lawyer is engaging in intentional misconduct. The threat of a potential chilling effect with respect to meritorious attorney conduct exists where a legitimate fear

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110 *See* PROF'L CONDUCT: Preamble and Scope.

111 "Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living." *Id.* § 9.

112 *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM §10 (AM. LAW INST., Tentative Draft No. 2, 2014) (emphasis added) ("A misrepresentation is fraudulent if the maker of it: (a) *knows* or believes that the matter is not as he represents it to be, (b) *knows* that he does not have the confidence in the accuracy of his representation that he states or implies, or (c) *knows* that he does not have the basis for the representation that he states or implies.").

113 Defamation may be proved with a showing of negligence. *See* RESTATEMENT (SECOND) OF TORTS § 558(c) (AM. LAW INST. 1977).

114 As one judge has opined, fraud is "an intentional tort that necessarily involves dishonest conduct that is antithetical to our legal system and the vital roles of attorneys in that system." Simms v. Seaman, 69 A.3d 880, 917 n.6 (Conn. 2013) (Palmer, J., dissenting).

115 "It is the perceived necessity for candid and unrestrained communications in those proceedings, free of the threat of legal actions predicated upon those communications, that is at the heart of the [Privilege]." Echevarria v. Cole, 950 So. 2d 380, 384 (Fla. 2007).

of inadvertent liability arises—not in situations characterized by a high level of mental culpability.[116]

3. A Litigation Privilege for a Transactional Context?

"Transactional" law is a broad umbrella term that contemplates a plethora of non-litigation legal services attorneys render to clients.[117] The term brings to mind real estate transactions, enterprise formation and operations, mergers and acquisitions, securities, tax, oil and gas, and a number of other practices that (hopefully) do not contemplate lawsuits or quasi-judicial proceedings.[118] The functions of an attorney in a transactional context are fundamentally different from those in a litigation context. A transactional attorney advises and negotiates on the client's behalf, seeking to effectuate a beneficial transaction for the client while minimizing the prospect of litigation.[119] Within the scope of the engagement, she uses her practical and legal acumen, knowledge of applicable legal principles, and understanding of customary practices to draft requisite transactional documents.[120] With each participant frequently retaining separate counsel, the participants only derive the contemplated financial benefits if the deal is consummated.[121] Although the participants frequently have differing interests with respect to the exact allocation of legal and economic benefits, these considerations are viewed in light of the overall business objective of closing the transaction. As a result, certain concerns that

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116 This is due to the unlikelihood of mistakenly doing something that requires a high level of intentionality. Chilling occurs where there is fear of a misstep that results in avoiding a certain kind of action altogether. *See, e.g.*, Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965); Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

117 *See generally* GARY M. LAWRENCE, DUE DILIGENCE IN BUSINESS TRANSACTIONS (2017); RICHARD K. NEUMANN, JR., TRANSACTIONAL LAWYERING SKILLS: BECOMING A DEAL LAWYER (2012); Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS'N LEGAL WRITING DIRECTORS 118, 122 (2008).

118 *See* sources cited *supra* note 117.

119 *See Business Law and Policy Specialization*, UCLA LAW, https://law.ucla.edu/academics/degrees-and-specializations/specializations/business-law-and-policy-specialization/transactional-practice/ (last visited Jan. 19, 2018).

120 *Id.*

121 It is possible for parties to obtain specified economic benefits if a deal does not "close." "Breakup fees," if negotiated for, require parties who back out of a negotiated transaction to pay a contracted fee to the other party. *See* Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1989); *In re* Smurfit-Stone Container Corp. S'holder Litig., No. C.A. No. 6164-VCP, 2011 WL 2028076, at *7 (Del. Ch. May 20, 2011); QVC Network, Inc. v. Paramount Commc'ns Inc., 635 A.2d 1245, 1246 (Del. Ch. 1993), *aff'd and remanded*, 637 A.2d 34 (Del. 1994).

litigators have with respect to their liability exposure do not exist in the transactional context. For example, fending off potential liability for claims of abuse of process, defamation, or sanctions for dilatory or frivolous litigation tactics are rarely, if ever, a dilemma for transactional attorneys.[122]

Accordingly, courts have been hesitant to extend the Privilege beyond the litigation context.[123] At first impression, the Restatement of the Law Governing Lawyers confines the Litigation Privilege to "proceedings."[124] Nonetheless, outside the litigation context—provided that legal counsel acts to further the client's objective without employing "wrongful means,"[125]—the Restatement allows for the invocation of the Litigation Privilege in limited circumstances to preclude attorney liability. These circumstances arise when an attorney renders legal advice or assists a client with respect to entering into or breaking a contract, or entering into or dissolving a legal relationship.[126] For example, a federal appellate court shielded counsel

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[122] There are of course certain types of potential liability unique to transactional attorneys. For example, counsel in securities offerings may be subject to liability as a primary violator under federal securities laws, as well as for aiding and abetting securities fraud in certain state jurisdictions. *See* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994); UNIFORM SECURITIES ACT §§ 508, 509 (UNIF. LAW COMM'N 2005); Marc I. Steinberg, *The Ramifications of Recent U.S. Supreme Court Decisions on Federal and State Securities Regulation*, 70 NOTRE DAME L. REV. 489 (1995).

[123] *See, e.g.*, Kurker v. Hill, 689 N.E.2d 833, 838–39 (Mass. App. Ct. 1998) (holding that the Privilege did not apply, the court addressed the Privilege in the context of attorneys advising their clients on an asset purchase—where claims included collusion to deflate the value of the assets underlying the transaction).

[124] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 56 cmt. a–c (AM. LAW INST. 2000). For example, "[v]igorous advocacy is important in adversary *proceedings*. Thus, a lawyer's partisanship in presenting evidence and argument, drafting and serving pleadings, and comparably pressing a client's case in such a *proceeding* is not considered extreme and outrageous and is privileged from such tort liability to the opposing party." *Id.* at cmt. g. (emphasis added). *See also* Vega v. Jones, Day, Reavis, & Pogue, 17 Cal. Rptr. 3d 26 (Ct. App. 2004). The California court reflected that "[a] fraud claim against a lawyer is no different from a fraud claim against anyone else." *Id.* at 31. At first glance, this approach appears to directly conflict with the California Supreme Court's decision in *Silberg*; however, the distinction is due to the transactional function of the attorney in the case at bar, who allegedly concealed facts material to a merger. *Id.*

[125] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 57(3). The Restatement does not offer any cases construing the term "wrongful means," offering only a hypothetical example: "wrongful means" would include threatening unfounded criminal prosecution. Presumably, counsel's perpetration of fraud would also constitute "wrongful means" as the Restatement recognizes a fraud exception to the Litigation Privilege. *See id.* § 56 cmt. f; *see also id.* § 98 cmt. c.

[126] *Id.* § 57(3).

> A lawyer who advises or assists a client to make or break a contract, to enter or dissolve a legal relationship, or to enter or not enter a contractual relation, is not

from liability when advising his clients with respect to whether they could break their enrollment contracts with a for-profit college due to their dissatisfaction with the program.[127] Indeed, there are other expansions of the Privilege in this advisory context, including a recent decision in Colorado where the court held that an attorney was immune from suit by non-clients in connection with the drafting of an estate plan.[128]

The existence of the Privilege in these contexts may be misplaced. When rendering advice with respect to contracts or within other business contexts, a lawyer's role is unlike that of an attorney in litigation. Namely, an adviser navigates applicable legal norms and customary practices ordinarily with the intention of avoiding litigation.[129] Nonetheless, the contractual context the Restatement contemplates reveals a concern with the anticipation or avoidance of litigation as opposed to that of pure transactional advice. The Restatement portends that this extension is necessary due to the need for the client to understand whether her actions will result in a breach of contract, and therefore, a prospective lawsuit, or if the breach is potentially defensible in litigation.[130] Hence, an attorney's advice with

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> liable to a nonclient for interference with contract or with prospective contractual relations or with a legal relationship, if the lawyer *acts to advance the client's objectives without using wrongful means.*

Id. (emphasis added). Although the language in this section appears broad, the commentary makes clear this exception is confined to narrow circumstances: "That protection reflects the need of contracting parties for advice and assistance, the difficulty of knowing in advance whether an arguable refusal to perform will be held to constitute an actionable breach of contract, and the view that even an actionable breach may sometimes be defensible." *Id.* cmt g.

127 Brown Mackie College v. Graham, 981 F.2d 1149, 1153 (10th Cir. 1992) (the attorney's actions resulted in a number of students withdrawing from their academic program due to the school's alleged violation of the Kansas Consumer Protection Act).

128 *See* Baker v. Wood, Ris & Hames, Prof'l Corp., 364 P.3d 872, 877 (Colo. 2016) ("[T]here exists the danger of placing conflicting duties on an attorney during the estate planning process if a nonclient is permitted to maintain a cause of action against a testator's attorney.") (quoting Noble v. Bruce, 709 A.2d 1264, 1270 (Md. 1998)).

129 For example, securities attorneys work diligently to ensure proper disclosure of material facts in public filings so as to minimize the bringing of lawsuits against their clients and affiliated persons by the Securities and Exchange Commission and shareholders. *See, e.g.*, *In re* Carter & Johnson [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847 (S.E.C. 1981); *In re* Emanuel Fields, [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,407 (S.E.C. 1973), *aff'd without opinion*, 495 F.2d 1075 (D.C. Cir. 1974).

130 RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 57 cmt. g in part provides,

> As with other advisors . . . lawyers are protected . . . for interfering with contracts or with prospective contractual relations or business relationships . . . . That protection reflects the need of . . . parties . . . [to know] in advance whether an arguable refusal to perform will be held to constitute an actionable breach of contract

respect to a client dissolving or altering legal relationships may be viewed from the perspective of the prospect of ensuing litigation and the merits of a contemplated defense, rather than rendering legal advice regarding a continuing business relationship. Accordingly, provided that the advisory role is integrally related to the realistic prospects of litigation, the extension of the Privilege to this "transactional" context is supported to some degree by the public policy concerns underlying the existence of the Privilege.[131]

4. Government Investigations and Corporate Internal Investigations

Although a government investigation is not litigation in the way of a traditional trial or proceeding relating to that trial (such as deposition testimony), whether such an investigation qualifies as a quasi-judicial proceeding is unresolved. Compared to enforcement proceedings before administrative agencies, which are considered quasi-judicial proceedings,[132] investigations are viewed as fact-finding expeditions undertaken for the purpose of deciding whether or not to bring an action.[133] Notably, a number of jurisdictions, although not with respect to attorney conduct, have offered some form of privileged status for statements made in the course of a government investigation. This supports the view that there exists sufficient similarities between investigations and quasi-judicial proceedings so as to extend certain protections.[134] For example, a witness to a crime would not be subject

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> . . . . [A] lawyer may ordinarily, without civil liability, advise a client not to enter a contract or to breach an existing contract.

131 *See, e.g.*, Sandra C. Segal, *It Is Time to End the Lawyer's Immunity from Countersuit*, 35 UCLA L. REV. 99, 134 (1987).

132 In determining whether an administrative body is quasi-judicial, relevant factors include

> (1) whether the administrative body is vested with discretion based upon investigation and consideration of evidentiary facts, (2) whether it is entitled to hold hearings and decide the issue by the application of rules of law to the ascertained facts and, more importantly, (3) whether its power affects the personal or property rights of private persons.

W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 114 (5th ed. 1984).

133 *See, e.g.*, SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735 (1984); Marc I. Steinberg, *SEC Subpoena Enforcement Practice*, 11 J. CORP. L. 1 (1985); *Investigations by the Securities and Exchange Commission*, SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/fast-answers/answersinvestghtm.html (last visited Jan. 17, 2018).

134 *See, e.g.*, Kissell v. Dunn, 793 F. Supp. 389, 391 (D.R.I. 1992); Williams v. Taylor, 181 Cal. Rptr. 423, 428 (Ct. App. 1982). These cases involved statements made to law enforcement agencies during their investigations. In *Kissell*, law enforcement personnel sought to obtain a warrant for the arrest of a corporate officer. Law enforcement used the affidavit of the defendant as premise for the warrant. 793 F. Supp. at 390. Notably, the court

to personal liability when reporting to the police the identity of a potential criminal.[135]

The more pertinent question is for what types of conduct an attorney may invoke the Litigation Privilege when representing her client in a government investigation. For example, would an attorney be liable to third parties for her conduct by impeding an investigation by a state securities board in connection with potential violations of "blue sky"[136] laws? While an attorney would incur potential criminal liability for obstruction of justice,[137] would an aggrieved third party be able to successfully sue the attorney for damages suffered as a result of this conduct? Although no civil or criminal proceeding has commenced, perhaps an analogy may be drawn between conduct during government investigations and conduct during pre-suit actions (such as issuing demand letters). Analysis of this question should include assessing whether the objectives underlying a fact-finding inquiry significantly differ from those implicated in judicial proceedings. Likewise, in corporate internal investigations, analogies may be drawn to pre-suit conduct. Corporate internal investigations involve fact-finding inquiries that determine civil and criminal liability exposure in order to advise corporate leadership on regulatory reporting requirements, litigation exposure, and how best to prepare for an impending suit.[138]

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recognized that only a qualified privilege existed. *Id.* at 391. In *Williams*, statements made by the plaintiff's superiors to law enforcement personnel in an effort to persuade the police to conduct a further investigation were held to be absolutely privileged. 181 Cal. Rptr. at 428.

135 *See, e.g.*, Williams, 181 Cal. Rptr. at 428. Interestingly, the court in *Williams* did not examine whether an absolute privilege would attach in the case of a report made to police in bad faith.

136 "Blue Sky" law is the popular term for state securities laws. The term arises from a frequently cited opinion by the U.S. Supreme Court discussing state securities law, observing that the object of the law "is aimed; that is, to use the language of a cited case, [towards] 'speculative schemes which have no more basis than so many feet of 'blue sky.'"" Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917) (the Court is indeed quoting this language, but never gives a citation for the case from which it is drawn). *See id.*; MARC I. STEINBERG, SECURITIES REGULATION 5 (7th ed. 2017).

137 *See, e.g.*, United States v. Cintolo, 818 F.2d 980 (1st Cir. 1987); People v. Martin, 185 Cal. Rptr. 556 (Ct. App. 1982).

138 *See generally* MARC I. STEINBERG & STEPHEN B. YEAGER, INSIDE COUNSEL: PRACTICES, STRATEGIES, AND INSIGHTS 279–305 (2015); DAN K. WEBB, ROBERT W. TARUN & STEVEN F. MOLO, CORPORATE INTERNAL INVESTIGATIONS (2017); Sherman Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739 (1997); Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859 (2003).

The U.S. Supreme Court's application of the work-product doctrine in *Upjohn Co. v. United States*[139] should be instructive when assessing whether a corporate internal investigation or a government investigation falls within the Litigation Privilege. As *Upjohn* made clear, corporate internal investigations are deemed sufficiently integral to contemplated litigation so as to invoke the work-product doctrine.[140] Likewise, attorney work-product in the context of government investigations, where a government agency is the catalyst for the investigation, comes within the doctrine.[141] In this setting, a government agency is using the power of its expansive authority to investigate possible wrongdoing on the part of subject persons; therefore, the need for the zealous advocate role of counsel may well be greater in this context than in internal investigations. This is not to say that a government investigation (or internal investigation) is, *per se*, litigation; nonetheless, the similarities are sufficiently close so as to merit recognition of substantive protections for client and counsel.[142]

The application of the Litigation Privilege to government investigations and corporate internal investigations is consistent with the ALI's standards as articulated in the Restatement of the Law Governing Lawyers.[143] This can be demonstrated by two hypothetical scenarios. First, suppose counsel is retained by a corporation investigating whether fraud was perpetrated by the accounting department with respect to the financial statements contained in the company's recent Securities and Exchange Commission (SEC) filing.[144] Counsel undertakes the investigation at the request of the company's board of directors and is tasked to investigate the facts,

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[139] Upjohn Co. v. United States, 449 U.S. 383 (1981).

[140] *Id.* at 401–02. For examples of appellate court decisions on this subject, see *In re* Int'l Sys. & Controls Corp. Securities Litig., 693 F.2d 1235 (5th Cir. 1982); *In re* Sealed Case, 676 F.2d 793 (D.C. Cir. 1982); *In re* John Doe Corp., 675 F.2d 482 (2d Cir. 1982).

[141] *See In re* Qwest Commc'ns Int'l, Inc., 450 F.3d 1179 (10th Cir. 2006); *In re* Steinhardt Partners, L.P., 9 F.3d 230, 232 (2d Cir. 1993); Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414 (3d Cir. 1991); *In re* Initial Pub. Offering Sec. Litig., 249 F.R.D. 457 (S.D.N.Y. 2008).

[142] *See* cases cited *supra* notes 140–41.

[143] *See generally* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 57(3) (AM. LAW INST. 2000).

[144] Prohibited by such provisions as Section 17(a) of the Securities Act, 15 U.S.C. § 77g(a) (2018), Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder. *See* 15 U.S.C.A. § 78j(b) (West 2010); 17 C.F.R. § 240.10b-5 (2018). For a comprehensive treatment of these key provisions of the federal securities laws, see 1 ALAN R. BROMBERG & LEWIS D. LOWENFELS, BROMBERG AND LOWENFELS ON SECURITIES FRAUD AND COMMODITIES FRAUD (2d. ed. 1997). *See also* Marc I. Steinberg, *Professor Alan R. Bromberg's Rule 10b-5*, 68 SMU L. REV. 617 (2015).

inform the board of the company's liability exposure (both civilly and criminally), and advise the board with respect to the company's obligations to report to the SEC and other authorities regarding the alleged misstatements.[145] In this scenario, counsel acts in a capacity where there is the threat of both civil and criminal liability for the company. As in the Restatement approach with respect to the breaching of contracts, counsel is advising the client on the potential legal consequences of taking, or declining to take, contemplated measures that implicate the distinct threat of prospective litigation.[146] With certain exceptions, the Restatement precludes liability for counsel advising with respect to potential breaches of contract.[147] As the role of counsel in this scenario is comparable to counsel's function in advising on the breach of a contract, the Restatement framework should apply, thereby precluding non-client liability exposure. And, as in the Restatement approach, fraud should be excepted, as it is fundamentally foreign to the duties of an attorney.[148]

Second, a scenario involving a government investigation is corporate counsel's advice with respect to the company's obligation to produce documents in an SEC investigation. Clearly, the specter of litigation prevails during the course of an SEC investigation, as the Commission may institute an enforcement action should it deem such action appropriate. In her role as counsel for the company, the attorney

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145 Lawyers advising publicly-held companies have an "up-the-ladder" reporting requirement as a result of Section 307 of the Sarbanes-Oxley Act (SOX). *See* 15 U.S.C. § 7245 (2018). This up-the-ladder reporting requirement signifies that "when a public company lawyer becomes aware that the company or its agents have materially violated the law, it is that lawyer's duty to advise his client of this information." *See* Karl A. Groskaufmanis, *Climbing "Up the Ladder": Corporate Counsel and the SEC's Reporting Requirement for Lawyers*, 89 CORNELL L. REV. 511, 512 (2004). A number of steps are required of counsel when attempting to comply with this reporting requirement. *See id.* at 518–20. The SEC has promulgated standards of professional conduct for attorneys to implement this SOX directive. *See* 17 C.F.R. § 205.1–205.7 (2017), *discussion in* STEINBERG, *supra* note 21, at 19–22.

146 *See generally* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 57(3) (AM. LAW INST. 2000).

147 *Id.* However, this includes an exception for "wrongful means," discussed *supra* note 126.

148 *See generally* MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. 9–13.

> [U]nder the privileges of an attorney at law, . . . such [fraudulent] acts are entirely foreign to the duties of an attorney; neither will he be permitted, under such circumstances, to shield himself from liability on the ground that he was [an agent], for no one is justified on that ground in knowingly committing wilful [sic] and premeditated frauds for another.

Poole v. Houston & T.C. Ry. Co., 58 Tex. 134, 137–38 (1882).

advises the corporate client what documents should be produced in order to adequately comply with the SEC's request. Assuming counsel acts in a non-fraudulent manner when advising the client to withhold certain documents from production, this function mirrors that of the lawyer contemplated in the Restatement, and the Privilege should apply.[149]

Accordingly, consistent with the Restatement's general approach, government investigations and corporate internal investigations are sufficiently analogous to litigation to allow the Privilege to bar, *absent fraud*, non-statutory common-law causes of action.[150]

IV
A NATIONAL THREAT TO ETHICAL STANDARDS

A. Trouble in Texas

The Restatements and the broad selection of judicial decisions discussed above provide lenses through which to view the contours of the Litigation Privilege. A recent decision in one of the nation's largest states has stretched the boundaries of the Privilege. Like other courts adhering to the Litigation Privilege, Texas courts apply the Privilege to cases involving counsel's representation of a client in connection with litigation.[151] One Texas appellate court noted that "to promote zealous representation, courts have held that an attorney is 'qualifiedly

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[149] *See generally* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 57.

[150] *See supra* notes 133–48 and accompanying text.

[151] Bradt v. West, 892 S.W.2d 56 (Tex. App. 1994). Giving an excellent rendition of the public policy behind the Privilege, the court stated,

> The public has an interest in "loyal, faithful and aggressive representation by the legal profession . . . ." An attorney is thus charged with the duty of zealously representing his clients within the bounds of the law. In fulfilling this duty, an attorney "has the right to interpose any defense or supposed defense and make use of any right in behalf of such client or clients as [the attorney] deems proper and necessary, without making himself subject to liability in damages . . . ." Any other rule "would act as a severe and crippling deterrent to the ends of justice for the reason that a litigant might be denied a full development of his case if his attorney were subject to the threat of liability for defending his client's position to the best and fullest extent allowed by law, and availing his client of all rights to which he is entitled."

Id. at 71 (alteration in original) (citations omitted) (quoting Morris v. Bailey, 398 S.W.2d 946, 947–48 (Tex. Civ. App. 1966)). *See also* Williams v. City of Frisco, No. 3:17-CV-2124-B, 2017 WL 5177255, at *2 (N.D. Tex. Nov. 7, 2017); Highland Capital Mgmt., LP v. Looper Reed & McGraw, P.C., No. 05-15-00055-CV, 2016 WL 164528, at *3 (Tex. App. Jan. 14, 2016); Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 405–06 (Tex. App. 2005).

immune' from civil liability with respect to non-clients, for actions taken in connection with representing a *client in litigation.*"[152] In Texas, this immunity generally applies even when the attorney conduct is wrongful or fraudulent within the framework of an underlying lawsuit.[153] Moreover, no independent private cause of action exists even if counsel's actions were frivolous.[154] Still, Texas has long held that limits apply to the Privilege. For example, in order to be protected from liability, actions of an attorney must be those that are not "entirely foreign to the duties of an attorney"[155] and those that are "the kind of conduct in which an attorney engages when discharging his duties to his client."[156] Texas courts have also recognized attorney liability to third parties with respect to negligent or fraudulent misrepresentation.[157]

A recent Texas Supreme Court decision concerning a prominent law firm has drastically altered the traditional boundaries of the Litigation Privilege in Texas. The decision presents an unwarranted expansion of the Litigation Privilege. If the decision's rationale is embraced by other

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[152] *Alpert*, 178 S.W.3d at 405. (emphasis added) (holding that a client of a law firm could not bring an action against the firm for "conspiring to defraud" the plaintiff in the course of litigation regarding the proper disbursement of a trust).

[153] *See* Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477 (Tex. 2015). Until recently, courts in Texas were divided as to the question of whether fraud is covered under the Privilege. *Compare* Toles v. Toles, 113 S.W.3d 899, 911 (Tex. App. 2003) (recognizing a fraud exception), Querner v. Rindfuss, 966 S.W.2d 661, 666 (Tex. App. 1998) (recognizing a fraud exception), *and* Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App. 1985) (recognizing a fraud exception), *with* Dixon Fin. Servs., Ltd. v. Greenberg, Peden, Siegmyer & Osmna, P.C., No. 01-06-00696-CV, 2008 WL 746548, at *8 (refusing to recognize a fraud exception for conduct within the scope of attorney's representation), *and Alpert*, 178 S.W.3d at 405 (refusing to recognize a fraud exception for conduct within the scope of attorney's representation).

[154] *Alpert*, 178 S.W.3d at 406.

[155] Poole v. Houston & T.C. Ry. Co., 58 Tex. 134, 137 (1882).

[156] *Dixon Fin. Servs. Ltd.*, 2008 WL 746548, at *9.

[157] *See, e.g.*, McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787 (Tex. 1999). The court reasoned that

> [u]nder the tort of negligent misrepresentation, liability is not based on the breach of duty a professional owes his or her clients or others in privity, but on an independent duty to the nonclient based on the professional's manifest awareness of the nonclient's reliance on the misrepresentation and the professional's intention that the nonclient so rely.

Id. at 792; *see* Sherwood v. South, 29 S.W.2d 805, 809 (Tex. Civ. App. 1930) (attorney fraud).

courts, the Litigation Privilege would become a safe harbor from private liability for miscreant lawyers.[158]

In 2015, a 5–4 decision by the Texas Supreme Court dramatically altered the scope of the Privilege in Texas.[159] In *Cantey Hanger*, the Texas Supreme Court held that attorneys were immune from a third-party claim for fraud when they assisted their client in the alleged fraudulent transfer of assets she obtained as the result of a divorce judgment.[160] The law firm represented the wife throughout the course of a contested divorce proceeding with the plaintiff husband. As alleged, after the entry of the divorce decree, the trial court ordered that the transfer of specified assets between the parties was to be effectuated within ten days and that the wife would be responsible for all taxes, liens, and assessments on the assets awarded to her in the divorce.[161] A year after the divorce decree was issued, the former wife sought to transfer to a third party an airplane deemed to be her separate property by the decree. As the aircraft had not been transferred to the wife within the ten-day time frame ordered by the court, the plane was still in the legal possession of the husband's leasing business at the time of the contemplated transaction.[162] With the alleged assistance of her attorneys, the wife used a fake name claiming to be a manager of the plaintiff's leasing company to falsify a bill of sale of the aircraft to the third party, thereby shifting tax liability for the sale of the aircraft to

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[158] *See* Baker v. Wood, Ris & Hames, Prof'l Corp., 364 P.3d 872, 875 (Colo. 2016); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 57(3) (AM. LAW INST. 2000); *see also* LJH, Ltd. v. Jaffe, No. 4:15-CV-00639, 2017 WL 447572 (E.D. Tex. Feb. 2, 2017).

[159] Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477 (Tex. 2015).

[160] *Id.* at 479. The law firm Cantey Hanger, and its attorneys, represented the wife, who prior to the divorce ran a leasing business, Lucy Leasing, with her former husband, of which the contemplated plane was a part. *Id.* The attorneys represented the wife throughout the duration of her divorce proceeding. *Id.*

[161] *Id.*

[162] Texas is one of the several "community property" states in the United States. These states derive the community property regime from Spanish law. The central legal principle of community property regimes is the joint ownership by both spouses of all property acquired during marriage. Upon divorce, community property is divided equitably by a judge. The father of Texas matrimonial property law, Professor Joseph McKnight, for over fifty years was a distinguished member of the SMU Dedman School of Law legal community; he passed away in 2015. *See* Joe Simnacher, *Joe McKnight, Family Law Expert, SMU Professor for 60 Years, Dies at 90*, DALL. NEWS (Dec. 15, 2017), https://www.dallasnews.com/obituaries/obituaries/2015/12/02/joe-mcknight-family-law-expert-smu-professor-for-60-years-dies-at-90; Symposium, *Tribute to Joseph W. McKnight*, 55 SMU L. REV. 15–375 (2002).

her husband's business. The plaintiff former husband sued the law firm for fraud, and litigation ensued.[163]

In reversing the appellate court and reinstating the trial court's award of summary judgment to the law firm on the basis of immunity, the court reasoned that the law firm was carrying out a task sufficiently related to the divorce decree so as to warrant the invocation of the Litigation Privilege.[164] Notably, the court mistook the nature of the responsibility given to the attorneys as a result of the divorce decree. The transfer of ownership of the plane was to be settled as to the parties to the divorce, not between a party to the divorce and an uninvolved third party.[165]

In another important holding, the court held that not excepting fraud from the Privilege is "consistent with the nature and purpose of the attorney-immunity defense."[166] The court reasoned that "merely labeling an attorney's conduct 'fraudulent' does not and should not remove it from the scope of client representation or render it 'foreign to the duties of an attorney.'"[167] The court noted that not all fraud is protected by attorney immunity; rather, only fraud that is within the

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163 *Cantey Hanger*, 467 S.W.3d at 479.

164 *Id.* at 480. "[Cantey Hanger] conclusively established that its alleged conduct was within the scope of its representation of [the wife] in the divorce proceedings." *Id.* at 484. The court reasoned that

> [plaintiff] essentially complains that the manner in which Cantey Hanger carried out a specific responsibility assigned to it by the divorce decree—transferring ownership of the plane awarded to [the wife]—caused tax liabilities to be imposed on the parties to the divorce in a way that violated the decree. Meritorious or not, the *type* of conduct alleged falls squarely within the scope of Cantey Hanger's representation of [the wife] in the divorce proceedings.

Id. at 485.

165 *Id.* This factual distinction is key. While the transfer of the plane between the husband and wife was contemplated by the divorce and therefore likely sufficiently related to the underlying litigation so as to warrant the invocation of the Privilege, a transfer of the plane between the wife and an unrelated third party was a *de novo* transaction uncontemplated by the divorce proceedings.

166 *Id.* at 483 (arguing that a fraud exception would "significantly undercut the defense").

167 *Id.* at 483–84. The court noted the difficulty a fraud exception would have with respect to the evidentiary burden. It is unclear whether a plaintiff would first need to prove fraud before establishing an exception from the Privilege, or whether the burden is on the defendant to dispute the fraud allegations before asserting an immunity defense. Federal Rules, which are incorporated into many states' rules of procedure, require heightened pleading standards for fraud, requiring that fraud be pleaded "with particularity." *See* FED. R. CIV. P. 9(b); *see also* FLA. R. CIV. P. 1.120(b); MASS. R. CIV. P. 9(b); N.Y. C.P.L.R. 3016(b). *See also* Tellabs, Inc. v. Makor Issues & Rights, 551 U.S. 308, 327 (2007).

scope of an attorney's legal representation of the client in litigation is protected.[168]

The dissenting opinion in *Cantey Hanger* was highly critical of the majority's application of the Privilege to the attorneys' alleged actions in their representation of the wife. While the dissent agreed that fraud is not an exception from the Privilege, and therefore fraud claims related to litigation are barred,[169] it took issue with the majority's application of the Privilege to the attorneys' actions that it viewed as outside the context of litigation.[170] The dissenting justices opined that the defendants failed to "conclusively establish that [the] alleged conduct occurred in litigation."[171] Rather, the dissent reasoned that the divorce decree was a final judgment that terminated the underlying divorce litigation,[172] and therefore the transfer of the plane was an action taken long after the termination of litigation and accordingly was unrelated to any litigation proceeding.[173] Disagreeing with the dissent's characterization, the majority asserted that the dissent misconstrued the scope of its opinion, reasoning that its holding did not extend immunity to contexts outside of litigation.[174]

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168 *Cantey Hanger*, 467 S.W.3d at 484 (presenting a direct conflict with the ABA Model Rules, which do not provide any examples of protected fraudulent conduct by an attorney).

169 *Id.* at 489 n.2 (Green, J., dissenting). The dissent opted to focus not on the cause of action, but whether the conduct occurred in litigation. The opinion does not address whether this rationale applies to statutory causes of action.

170 *Id.* at 486.

171 *Id.* The dissent argued that this was participation in a fraudulent business scheme performed long after the entering of a divorce decree and that a bill of sale was not a document contemplated by the divorce proceeding. *Id.* at 491.

172 *Id.* at 490 (citing Lehman v. Har-Con Corp., 39 S.W.3d 191, 195 (Tex. 2001)) ("[F]inal judgments dispose of all pending parties and claims."). However, this should not be construed as marking the end of an attorney's representation of her client in connection with litigation, as there is some "winding up" required. *See* discussion *supra* notes 52–65 and accompanying text.

173 *Id.* at 491. (the transfer having taken place a year after the decree, despite the decree having ordered the effectuation of transactions related to the decree to be made within ten days).

174 *Id.* at 482 n.6 (Lehrmann, J., majority). Strangely, the majority cited two cases to give as examples of when courts have applied attorney immunity outside the litigation context. The dissent responded that the citations given by the majority are "unpublished cases . . . [that] are either distinguishable or erroneously decided." *Id.* at 489 n.3 (Green, J., dissenting). The dissent concluded that the majority engaged in "conclusory analysis [constituting] no analysis at all, [rendered] in actuality, merely a scope-of-representation test" that "cannot be the law, or almost anything an attorney does would be protected from civil liability," and that a scope-of-representation test is "contrary to every published court of appeals opinion on the subject, and has been flatly reject [sic] by the restatement." *Id.* at 490, 493.

B. Appellate Appeasement

The effects of the *Cantey Hanger* decision have reverberated into the federal courts, potentially posing a larger extension of the Privilege. In *Troice v. Proskauer Rose, L.L.P.*,[175] the U.S. Court of Appeals for the Fifth Circuit addressed attorney conduct in the course of an SEC investigation into the Allen Stanford Ponzi Scheme.[176] In suing a prominent national law firm and one of its partners, the plaintiffs alleged that counsel had aided and abetted common-law fraud as well as violated the Texas Securities Act (TSA) while representing the client before the SEC.[177] Applying Texas law, the court declined to resolve whether the Privilege applies only when there is litigation, deeming the issue waived as a result of the plaintiffs' failure to raise the argument in the district court.[178] The problems potentially presented by *Troice* are not derived merely from the fact that it was decided by a federal appellate court. The context of the decision as that of a law firm allegedly acting fraudulently on a client's behalf in a government investigation should sound an alarm with respect to the extension of the Litigation Privilege in this setting to allegedly miscreant attorneys. This open issue may well provide colorable arguments to such counsel that

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[175] Troice v. Proskauer Rose, LLP, 816 F.3d 341, 345 (5th Cir. 2016). The court first focused on whether the Privilege provided a qualified or absolute immunity from suit.

[176] *Id.* Allen Stanford was the CEO of Stanford Financial Group, a global financial services company with billions of dollars in assets under management. In 2009, the company was shut down, and its executives were charged with instituting a fraudulent investment scheme. Stanford offered investors unusually high returns on certificates of deposit issued by a bank in Antigua. In fact, the returns were based on fraudulent data, and investors' funds were misappropriated, costing investors over $7 billion. Stanford was caught before he could leave the country and was sentenced to 110 years in prison and ordered to disgorge billions. *See* Clifford Krauss, *Stanford Sentenced to 110-Year Term in $7 Billion Ponzi Case*, N.Y. TIMES (June 14, 2012), https://www.nytimes.com/2012/06/15/business/stanford-sentenced-to-110-years-in-jail-in-fraud-case.html; Dan Roan & Patrick Nathanson, *Defiant US Fraudster Allen Stanford Vows to Clear Name*, BBC NEWS (Jan. 11, 2016), http://www.bbc.com/news/world-35283297.

[177] *Troice*, 816 F.3d at 344. The plaintiffs alleged that the attorney in question: (1) sent a letter to the SEC arguing that the SEC did not have jurisdiction over the CD sales as they were not securities under U.S. law; (2) made statements to the SEC related to requested documents from Antigua, the origin of the fraud, regarding the "credibility and legitimacy" of Stanford Financial Group; (3) stated to SEC lawyers that Stanford executives were better able to explain in depositions, as opposed to Stanford, details of Stanford Financial's business; and (4) the attorney failed to correct lies and suborned perjury during a Stanford executive's sworn testimony before the SEC. *Id.*

[178] *Id.* at 349. A recent example of the broad application of the Privilege outside the context of litigation involves an attorney's preparation of his client's estate plan. *See* Baker v. Wood, Ris & Hames, Prof'l Corp., 364 P.3d 872, 875 (Colo. 2016).

their allegedly fraudulent conduct in connection with a government investigation comes within the scope of the Privilege.[179]

In addition to their common-law claims, the plaintiffs in *Troice* sought recovery pursuant to the Texas Securities Act—a statutory right of action.[180] The Fifth Circuit held that the issue whether the Privilege applies to Texas Securities Act claims was waived in the district court.[181] With few exceptions, the Privilege has been widely limited to common-law causes of action.[182] Nonetheless, after *Troice*, it is an open question in the Fifth Circuit whether the Privilege can apply to preclude suits based upon express statutory rights of action conferred by the legislature.[183]

The application of the Privilege to express statutory rights of action is notable indeed, as there are federal and state statutes that explicitly contain anti-waiver provisions in order to ensure their enforceability. For example, Section 14 of the Securities Act and Section 29 of the Securities Exchange Act explicitly void any attempt to waive any provision of the respective Act or SEC rule or regulation promulgated thereunder.[184] State statutes likewise have such anti-waiver provisions.[185] The application of the Privilege to override statutory anti-waiver provisions would be the height of judicial activism.

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[179] As discussed above, a number of privileges apply to attorney conduct within the course of an internal corporate investigation or a government investigation. Some privileges, such as the attorney-client privilege, may be invoked in corporate internal investigations and government investigations.

[180] *See generally* TEX. REV. CIV. STAT. ANN. art. 581–33 (West 2017).

[181] "[P]laintiffs argued for the first time that attorney immunity does not apply to their Texas Securities Act claims. Plaintiffs waived this argument by failing to brief it." *Troice*, 816 F.3d at 349 n.3 (citations omitted).

[182] *See, e.g.*, Echevarria v. Cole, 950 So. 2d 380, 384 (Fla. 2007) (holding that the Privilege applies to all causes of action, both common-law and those derived from statutory authority).

[183] To do so is not without national precedence, as demonstrated by the Florida Supreme Court in *Echevarria*, discussed *supra* notes 91–100 and accompanying text.

[184] Securities Act of 1933 § 14, 15 U.S.C. § 77n (2018); Securities Exchange Act of 1934 § 29(a), 15 U.S.C. § 78cc (2018).

[185] *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 581-33(L) (West 2017). The Texas Securities Act provides "*Waivers Void.* A condition, stipulation, or provision binding a buyer or seller of a security or a purchaser of services rendered by an investment adviser or investment adviser representative to waive compliance with a provision of this Act or a rule or order or requirement hereunder is void." See also ARIZ. REV. STAT. ANN. § 44-2000 (2018); KAN. STAT. ANN. § 17-12a509(i) (West 2018).

V
UNACCEPTABLE EXPANSIONS OF THE LITIGATION PRIVILEGE AND THEIR RAMIFICATIONS

Decisions like *Cantey Hanger* represent an exceedingly dangerous expansion of the Litigation Privilege. It is true, of course, that the public interest is best served by an attorney's ability to zealously represent his or her client. The adversarial system effectuates the interests of justice and the pursuit of truth.[186] The attorney-client privilege, the work-product privilege, the Litigation Privilege, as well as applicable ethical mandates, for example, help enable legal counsel to competently and zealously represent his client. These mechanisms are essential to legal counsel's mission. However, these legal doctrines have never permitted, and the public interest is not aptly served by enabling, miscreant legal counsel to avert private liability to those injured by such attorney conduct.

That this lack of restraint on legal counsel connotes misguided public policy is reflected in the ABA's Rules of Professional Conduct. These rules provide, for example, that it is professional misconduct for an attorney to engage in fraud or dishonesty, or to knowingly assist her client to engage in fraudulent conduct or to commit criminal acts.[187] Indeed, scores of attorneys have been subject to civil litigation by both

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[186] For a cogent defense of the adversarial system, see Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1410 (2008).

[187] *See* MODEL RULES OF PROF'L CONDUCT r. 1.2(d), 4.1, 8.4 (b-c) (AM. BAR ASS'N 1983). Rule 1.2(d) provides that

> [a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Id.

the government[188] and private parties,[189] as well as criminal prosecution,[190] for allegedly engaging in such misconduct.

It may be of little solace that the majority in *Cantey Hanger* posits that its holding does not extend the Privilege to cover those actions of attorneys who represent clients in matters unconnected with litigation. Unfortunately, the facts of that case may be construed to implicitly extend this protection to contexts outside of litigation.[191] Revealingly, the majority in *Cantey Hanger* elected to use the term "attorney immunity" instead of the traditionally accepted nomenclature: "Litigation Privilege."[192] A search of national case law on this issue reveals scarce mention of the Privilege as "attorney immunity" prior to *Cantey Hanger*.[193] This change in terminology gives rise to the prospect that the decision represents an attempt to distance the doctrine from its proper place in the litigation context.[194] This impression is buttressed by the court's citation of cases involving fact patterns where the Privilege seemingly was applied to contexts outside litigation.[195]

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188 *See, e.g.*, SEC v. Frohling, 664 F. App'x 66 (2d Cir. 2016); SEC v. Merkin, 628 F. App'x 741 (11th Cir. 2016); SEC v. Fehn, 97 F.3d 1276 (9th Cir. 1996); MARC I. STEINBERG, ATTORNEY LIABILITY AFTER SARBANES-OXLEY §§ 3.04, 4.01 (2017) (listing SEC enforcement actions against attorneys).

189 *See, e.g.*, Thompson v. Paul, 547 F.3d 1055 (9th Cir. 2008); Rubin v. Schottenstein, Zox & Dunn, 143 F.3d 263 (6th Cir. 1998); Ackerman v. Schwartz, 947 F.2d 841 (7th Cir. 1991). STEINBERG, *supra* note 188, §§ 2.05, 5.03–5.04, 6.04 (discussing cases). Michael R. MacPhail, *SEC Enforcement Actions Against Lawyers*, AM. B. ASS'N, https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_wcc_secenforcement.authcheckdam.pdf (last visited Feb. 21, 2018).

190 *See, e.g.*, United States v. Collins, 665 F.3d 454 (2d Cir. 2012); United States v. Gordon, 393 F.3d 1044 (9th Cir. 2004); New York v. Belnick, No. 00145103 (N.Y. Sup. Ct. 2004), *discussed in N.Y. Jury Finds Ex-Tyco Counsel Not Guilty on Larceny, Fraud, Charges*, 36 SEC. REG. & L. REP. (BNA) 1316 (2004); STEINBERG, *supra* note 188, § 4.01 (listing cases).

191 *See discussion supra* notes 163–65 and accompanying text.

192 *See* Anenson, *supra* note 13, at 916 n.2 (other terms have been used as a substitute for the Litigation Privilege, but the term "attorney immunity" cannot be found).

193 A search of Westlaw reveals that "attorney immunity" has been used more recently as a result of *Cantey Hanger* in a number of Texas decisions. Mentions of "attorney immunity" outside of Texas are reserved for the immunity of government prosecutors, such as in Oklahoma. *See, e.g.*, Powell v. Seay, 553 P.2d 161 (Okla. 1976).

194 The term "attorney immunity" itself appears to be a far broader term than "Litigation Privilege." "Immunity" is typically construed broader than mere "privilege," and "litigation" curtails where "privilege" applies—where "attorney immunity" possesses no such qualifying term. *See e.g.*, Troice v. Proskauer Rose, LLP, 816 F.3d 341, 345–47 (5th Cir. 2016).

195 If the majority intended to not comment on whether the Privilege should apply to contexts unconnected with litigation proceedings as it claimed, then there is no reason for the citations to appear in the first place. Cantey Hanger, LLP, v. Byrd, 467 S.W.3d 477, 489 n.3 (Tex. 2015).

Perceptively, the *Cantey Hanger* dissent pointed out that the divorce proceedings did not contemplate the transfer of assets to third parties but only the transfer of assets between the parties to the divorce.[196] Even if the transfer of the airplane to a third party took place within the ten-day window ordered by the court, the law firm's representation of its client in such a transfer was not connected to the underlying divorce proceedings, as third-party transfers were not contemplated during those proceedings. Divorce proceedings ordinarily focus on the settling of the multi-faceted issues presented in the relationship between the two former spouses and their children.[197] This includes the dividing of real and personal property amongst the spouses and deciding what custody, child support, and alimony obligations the spouses will carry forward, in addition to visitation rights.[198] For example, a transfer that would be in connection with the divorce judgment would be the transfer of a home or parcel of real property between the two parties that was allocated to a particular spouse pursuant to the divorce decree. Any subsequent transfer of the real property to a third party would not be contemplated by the divorce proceedings.[199]

It is true that rendering legal advice to a client regarding the fallout from litigation is part of an attorney's role as advisor, but the lawyer's function as litigator should not extend to every situation tangentially related to trial. The transfer in *Cantey Hanger*, made an entire year after the close of litigation, represented a transaction uncontemplated by the divorce proceedings. The sale of an airplane to a third party in a negotiated transaction bore no reasonable relation to the divorce proceedings. The wife's alleged actions were nothing more than an attempt to commit fraud in order to receive a financial benefit and to

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196 *Id.* at 491 (the alleged fraudulent transfer was effected via a bill of sale from the wife to a third-party buyer of the plane approximately one year after the entrance of the divorce decree).

197 *See Divorce Agreement*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Separation Agreements* in *Introduction: Summary Overview of Ch. 7 (Agreements)*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2002); *Divorce*, AM. B. ASS'N, https://www.americanbar.org/portals/public_resources/aba_home_front/information_center/family_law/marriage_and_divorce/annulment_separation_divorce/ending_the_marriage/divorce.html (last visited Feb. 13, 2018).

198 *See generally* ARNOLD H. RUTKIN, FAMILY LAW AND PRACTICE (2008) (comprehensive treatise on the area of family law).

199 *Cantey Hanger*, 467 S.W.3d at 491 ("Even assuming that preparation and execution of documents as provided for in a divorce decree could continue the litigation, Cantey Hanger's alleged drafting of the bill of sale was not the type of transfer document the divorce decree contemplated. The divorce decree contemplated a transfer from Lucy Leasing (a company awarded to Byrd under this decree) [to wife] within ten days of its entry.").

avoid paying taxes.[200] That the attorneys she used to effectuate this allegedly unlawful scheme are the same as those she used in the divorce proceeding does not signify that the matter was sufficiently related to the divorce.[201]

Simply put, if attorneys are able to avoid private liability to non-clients when they knowingly aid clients to commit criminal or fraudulent acts in a setting unrelated to litigation, innocent victims harmed by such counsel's misconduct will be left without monetary redress against a principal miscreant of the underlying scheme. Third parties bear significant loss: if the other tortfeasors are judgment-proof, aggrieved parties have no avenue to meaningful relief that will adequately compensate their injury. Public sanctions of attorneys are insufficient recourse in such situations. It is of little comfort to third parties that are materially, financially harmed by malevolent attorneys that those attorneys may incur sanctions from the bar association or barred from the practice of law.[202]

Furthermore, state bar associations have shown themselves hesitant to hold attorneys accountable for alleged misconduct. For example, a 2015 report by the State Bar Association of California reported that it received over 16,000 complaints in 2014 yet filed formal charges in barely 1000 cases, a rate of 6.25%.[203] The same is true with respect to other state bar associations: In Arizona, for example, a state with over

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200 Perhaps aggravating her ex-husband was a desirable by-product of the transaction. For self-help in avoiding pettiness post-divorce, see WENDY PARIS, SPLITOPIA: DISPATCHES FROM TODAY'S GOOD DIVORCE AND HOW TO PART WELL (2016).

201 For example, a real estate attorney who effectuates a sale of a commercial property for a client does not also serve as that client's attorney for the sale of his personal home. The scope of an attorney's representation should be set out in an initial engagement letter. A well-drafted engagement letter delineates, among other items, the scope of the representation and the fees to be charged. *See* Sample Engagement Letters in STEINBERG, *supra* note 21, at 217.

202 *See generally* John C. Coffee, Jr., *Gatekeeper: Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U.L. REV. 301 (2004); Reiner H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984); Marc I. Steinberg, *Attorney Liability for Client Fraud*, 1991 COLUM. BUS. L. REV. 1 (1991); Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387 (2004); Assaf Hamdani, *Gatekeeper Liability*, Comment, 77 S. CAL. L. REV. 53 (2003); *Annual Discipline Report*, ST. B. CAL. (Apr. 30, 2015), http://www.calbar.ca.gov/LinkClick.aspx?fileticket=1fA6XzPn3gE%3D&tabid=224&mid=1534.

203 *Annual Discipline Report*, *supra* note 202, at 1. The report also noted that over *half* of the complaints filed with the bar required over 263 days to reach the filing of disciplinary charges.

24,000 licensed attorneys as of 2016,[204] only thirty-seven attorneys have been disbarred in the past three years combined.[205] In Florida, the state bar has become steadily less active, seeing a drop in over 2700 cases opened from 2013 to 2017, a number representing a thirty-eight percent drop.[206]

With public disciplinary sources, such as the state bar associations mentioned above, all too frequently imposing illusory sanctions, it is paramount that private citizens have a meaningful avenue to seek redress for legitimate grievances.[207] Related thereto, courts should not develop doctrines that allow attorneys to operate in ways that are directly contradictory to their responsibilities as members of the legal profession and that obfuscate legal counsel's function as professionally responsible fiduciaries to their clients. Clearly, attorneys are to advise and advocate zealously on behalf of their clients within the bounds of the law.[208] They should not be immune from liability to non-clients when they act as knowing perpetrators or aiders in their clients' misdeeds, irrespective of whether the representation is related to litigation.[209]

The tenor of decisions like that of the Texas Supreme Court in *Cantey Hanger* invites courts to immunize a wide range of attorney conduct to the detriment of non-clients. For example, assume that an attorney drafts a document whereby the client warrants the accuracy of a third-party appraisal regarding the value of his client's ranch. The attorney knowingly drafts this document, at the request of his client,

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204 ANNUAL REPORT OF THE ATTORNEY REGULATION ADVISORY COMMITTEE TO THE ARIZONA SUPREME COURT, STATE BAR ASSOCIATION OF ARIZONA 3 (Apr. 27, 2017), http://www.azbar.org/media/1615796/2017arcannualreportof2016data.pdf.

205 *Id.* at 10.

206 FLORIDA DISCIPLINARY BAR STATISTICS, STATE BAR ASSOCIATION OF FLORIDA, https://www.floridabar.org/wp-content/uploads/2017/04/16-17-Statistics-for-Web.pdf (last visited Feb. 14, 2018). For other examples of other state bar disciplinary processes that may be viewed as inadequate, see 2016 ANNUAL REPORT, ATTORNEY REGISTRATION & DISCIPLINARY COMMISSION 3–4, http://www.iardc.org/AnnualReport2016Highlights.pdf (disbarring a mere thirty-four attorneys in 2016 when over 5400 grievances were filed in Illinois); 2017 ANNUAL REPORT, NORTH CAROLINA STATE BAR: OFFICE OF COUNSEL, https://www.ncbar.gov/media/490647/2017-counsel-annual-report.pdf (disbarring a mere eighteen attorneys after nearly 1400 grievances); LADB STATISTICS: SANCTIONS FOR MISCONDUCT, LOUISIANA ATTORNEY DISCIPLINARY BOARD, https://www.ladb.org/Statistics/ (last visited Mar. 19, 2018) (disbarring four attorneys in 2016 and eleven in 2017).

207 Derived from the Latin maxim *Ubi Jus Ibi Remedium*, "for every wrong, the law provides a remedy."

208 *See* MODEL RULES OF PROF'L CONDUCT: PREAMBLE AND SCOPE, § 8 (AM. BAR ASS'N 1983).

209 *See discussion supra* notes 201–02 and accompanying text.

that fraudulently alters the appraisal valuation of the underlying tract of land. This misrepresentation inflates the price of the parcel, which the client then sells to a third party. Upon the third party's discovery of the defect in the document, the fraudster client absconds to "paradise,"[210] with the attorney being the sole potential source of monetary redress. As the attorney was acting in the course of representation of his client by drafting a document relating to the sale of the land, an undue expansion of the Privilege would preclude liability to the non-client in a common-law fraud action.

Consider this securities practice scenario (assuming that the Privilege applies to non-litigation contexts): Attorneys from a law firm are engaged by an issuer of equity securities to provide legal services with respect to perfecting the section 3(b)(2) exemption[211] from Securities Act registration.[212] The issuer has recently hired an executive officer (who happens to be the brother-in-law of the CEO) who, three years ago, was barred from the securities industry for fraud. Both the issuer and the attorneys have actual knowledge of the officer's checkered past and know that disclosure of this information would result in the triggering of bad-actor disqualifications,[213] thereby preventing the issuer from using this exemption. The issuer insists on availing itself of the section 3(b)(2) exemption and directs the attorneys to falsify documents provided to investors and the SEC. The offering is consummated; subsequently, it is revealed that the officer with the checkered past forged financial statements that were submitted to investors. The issuer goes bankrupt, investors incur significant

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210 For a riveting, real-life account of a fraudster absconding to paradise, see Marc Lacey & Jonathan Kandell, *A Last Vanishing Act for Robert Vesco, Fugitive*, N.Y. TIMES (May 3, 2008), http://www.nytimes.com/2008/05/03/world/americas/03vesco.html. Robert Vesco was a fraudster financier who fled his American legal problems and traveled to the Bahamas, Costa Rica, and finally Cuba, where he was imprisoned by the Castro regime. *Id.*

211 Section 3(b)(2) exempts a class of securities where the aggregate offering amount of all securities offered and sold under the exemption in a twelve-month period does not exceed $50 million. 15 U.S.C. § 77c(b)(2) (2018). *See* Securities Act Release No. 9741 (2015) (revising Regulation A in view of § 3(b)(2)); Michael Andrews, *The Regulation A+ Exemption: Provider of Practical Tiers or Pointless Tears?*, 44 SEC. REG. L.J. 221 (2016).

212 Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e (2018), requires, absent an exemption, that all offers and sales of securities must be registered with the Securities and Exchange Commission.

213 "Bad Actor" disqualifications prevent certain issuers from using a number of exemptions from registration. Bad Actor disqualifiers cover issuers as well as directors, officers, promoters, investment managers, and certain beneficial owners of the issuer. A party may be deemed a "bad actor" for prior securities-related convictions, court orders, or sanctions depending on the subject matter of the action and how long ago the violation occurred. *See* 17 C.F.R. § 230.262.

financial losses, and the individual defendants are judgment-proof. May the investors successfully bring an action against the attorneys and their law firm for fraud? In both these hypotheticals, there is no underlying litigation. By analogy in *Cantey Hanger*, there was in fact an underlying divorce proceeding, but the divorce proceeding was so remote to the transaction at the heart of the dispute so as to cause alarm to the dissenters that a "scope-of-representation" test[214] was being embraced. If the difference between these scenarios is only that there is some history of litigation, whether or not actually integrally related to the transaction at bar, it may not be a "far reach" for a court to further expand the Privilege to hold that a connection to litigation is no longer necessary to the invocation of the Privilege. Under such a construction, the Privilege would be transformed to an immunity attaching to the function of an attorney.[215]

As to our securities hypothetical, as a result of the U.S. Supreme Court's *Central Bank of Denver, N.A. v. First Interstate Bank of Denver* decision, aiding and abetting liability under section 10(b),[216] the flagship anti-fraud provision of the federal securities laws, has been foreclosed in private actions.[217] To fill the gap, states' blue sky laws, particularly in those states that have remedial securities laws, have offered attractive avenues to litigate aider claims as to private

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214 The term used by the dissent in Cantey Hanger LLP v. Byrd, 467 S.W.3d 477, 490 (Tex. 2015) (Green, J., dissenting).

215 This line of thought has already been at least tacitly acknowledged, as the court pointed to instances when the Privilege was applied outside the litigation context. *Id.* at 489 n.3.

216 15 U.S.C. § 78(b) (2018). *See* BROMBERG, *supra* note 144, § 7:364.

217 Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, 511 U.S. 164, 191 (1994). The court reasoned that the text of Section 10(b) did not explicitly codify a private right of action. *Id.* at 179–80. As such, a party must be deemed a primary violator (the party that actually committed the securities fraud violation) in order to be successfully sued in private actions under Section 10(b) and Rule 10b-5 promulgated thereunder. To add to the restrictive decision in *Central Bank*, the Supreme Court has continued to weaken the scope of Section 10(b) in several subsequent Supreme Court decisions. *See* Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135 (2011); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010); Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148 (2008). Due to the weakening of Section 10(b), as well as the impact of federalizing class actions involving nationally traded companies (such as those on the New York Stock Exchange or Nasdaq), successfully suing the aiders of fraudulent issuers has become increasingly difficult. *See* Marc I. Steinberg, *Pleading Securities Fraud Claims—Only Part of the Story*, 45 LOY. U. CHI. L.J. 603 (2014). *See generally* MARC I. STEINBERG, THE FEDERALIZATION OF CORPORATE GOVERNANCE (Oxford Univ. Press 2018).

parties.[218] If an attorney may assert the Privilege in a fraudulent securities offering lawsuit, thereby avoiding aider liability with respect to both common-law and statutory claims, there would be no private remedy available against malevolent securities counsel. This issue has been explicitly left open in *Troice*, when interpreting Texas law, despite the fact that the Texas Securities Act expressly provides for aider liability.[219]

The public policy rationales for the existence of the Privilege cannot be properly translated to the transactional context. Clearly, the Privilege's key objective is to enable parties and other affected persons and their legal counsel to fully address all aspects of the subject litigation in an unencumbered, law-compliant manner.[220] An attorney thus should not be "hobbled by the fear of reprisal by actions for defamation" which may tend to lessen his or her efforts on behalf of clients.[221] The very nature of the adversarial system frequently places parties in a zero-sum game. It is often necessary for an attorney to bring to light flaws in the positions advanced by his client's adversary in order to discredit the assertions made by the non-client and thereby zealously represent his client. This strategy, portraying adverse non-clients in a negative light, might result in the infliction of emotional distress upon the opposition, interference with his current or potential business relationships, invasions of privacy, or defamation of character.[222]

Recognition of these consequences should not be extended to contexts outside of litigation. While an attorney who drafts closing documents for the sale of real estate owes diligence and loyalty to the subject client, there is no underlying adversary process in which there is a search to properly determine fault. In this setting, counsel need not

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218 *See* Klein v. Oppenheimer & Co., 130 P.3d 569 (Kan. 2006); Sterling Trust Co. v. Adderley, 168 S.W.3d 835 (Tex. 2005); UNIFORM SECURITIES ACT § 410 (UNIF. LAW COMM'N 2005).

219 Texas Securities Act art. 581-33(F)(2) states,

> [a] person who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security is liable [under this act] jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer.

220 Surace v. Wuliger, 495 N.E.2d 939, 944 (Ohio 1986).

221 Russell v. Clark, 620 S.W.2d 865, 868 (Tex. Civ. App. 1981) (describing the "chilling effect," discussed *supra* note 116).

222 *See generally* Judith Kilpatrick, *Regulating the Litigation Immunity: New Power and Breath of Fresh Air for the Attorney Discipline System*, 24 ARIZ. ST. L.J. 1069, 1072–73 (1992); Sandra C. Segal, *It Is Time to End the Lawyer's Immunity from Countersuit*, 35 UCLA L. REV. 99, 134 (1987).

be concerned about exposing herself to liability for necessarily revealing an opposing party's poor business character in open court. These are purely transactional matters in which the attorney should refrain from engaging in misconduct.

CONCLUSION

Emerging case law represents an unacceptable mutation to an important common-law doctrine, with national implications for the conduct of attorneys. While "litigation" may be defined broadly and is not necessarily bookended by a formal beginning and end, the extension portrayed by these decisions shields attorney fraudulent conduct and reaches beyond the contours of litigation. Indeed, a number of the decisions portend the embracement of a "scope of representation" test that should not be the law. Attorneys should be free to zealously represent their clients within the bounds of the law, but the legal protections needed to help ensure effective representation should be confined to suitable contexts.

Fraud is *per se* outside the bounds of proper legal representation. In fact, fraud is outside the bounds of being a law-abiding citizen, irrespective of whether one happens to be an attorney. Litigators should not be immunized from meritorious non-client claims when they engage in fraud, particularly in view of their high degree of culpability and infliction of significant financial harm.

The extensions of the Privilege to contexts outside litigation and to claims of fraud are each objectionable on their own, but taken together they contain the potential to create a dangerous scope-of-representation privilege contemplated in *Cantey Hanger*'s dissent.[223] All too frequently, attorneys are challenged to the limits of acceptable conduct by the very nature of the responsibility to "zealously advocate" for their clients in litigation. Nonetheless, it is imperative to recognize that there is conduct an attorney simply may not engage in, even to the benefit of her client.

The public perception of and trust in the legal profession is in need of a boost. To some degree this mistrust will always exist. Unfortunately, a significant percentage of the citizenry lacks appreciation of the roles and functions of legal counsel. While the legal profession has taken steps to reform and move toward a better, trusting

223 *See* Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 490 (Tex. 2015) (Green, J., dissenting).

relationship with the public,[224] this process is ongoing and challenging. Antithetical to this objective is the broad application of the Privilege beyond the contours of litigation and immunizing attorney fraud from aggrieved non-client redress. Recognition of the Privilege in these contexts is detrimental to the legal profession and materially impairs meritorious non-client interests. Shielding such misconduct by miscreant lawyers is bad for the public and the legal profession.

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[224] Such steps include mandatory continuing legal education (CLE) and the provision and expansion of legal aid to underserved persons and communities. *See, e.g.*, Angela Morris, *Students Conceptualize Legal Aid Apps in New Law School Class*, TEX. LAW. (Jan. 30, 2018, 5:11 PM), https://www.law.com/texaslawyer/sites/texaslawyer/2018/01/30/students-conceptualize-legal-aid-apps-in-new-law-school-class/?slreturn=20180123164129 (this is a proud initiative of the SMU Dedman School of Law); Anamika Roy, *Report: Maryland Lawyers Give 1M Hours of Pro Bono Service, $100k in Funding*, DAILY REC. (Feb. 26, 2018), http://thedailyrecord.com/2018/02/26/maryland-attorneys-pro-bono/.